APPENDIX

FEB 27

MICHAEL RODA

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-658

CITY OF KENOSHA,
A Wisconsin Municipal Corporation;
CITY OF RACINE,
A Wisconsin Municipal Corporation;
ROBERT W. WARREN,
Attorney General of the State of Wisconsin,
Intervening Defendant;

Appellants,

v.

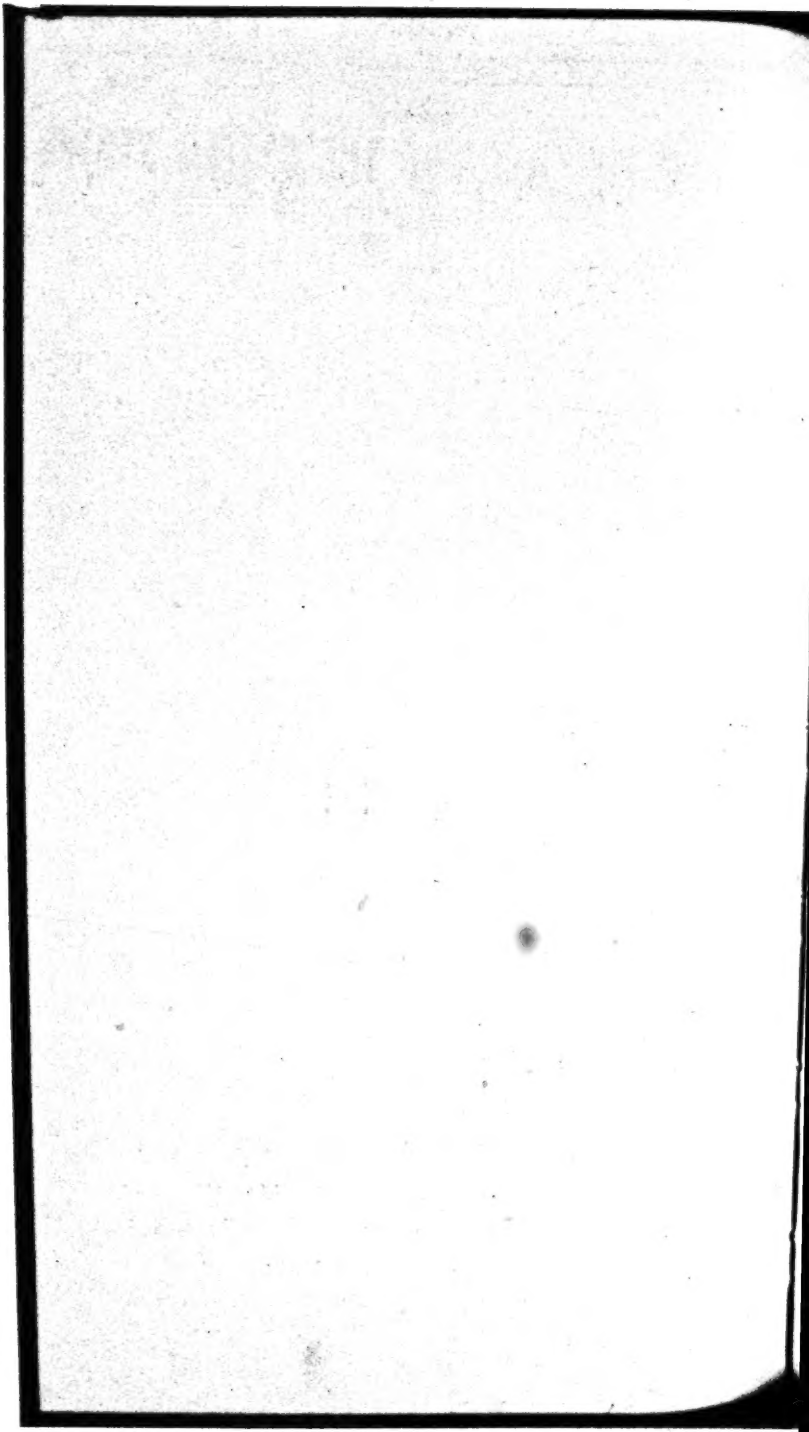
PETER G. BRUNO;	No. 71-C-330
BRUCE BLEASHKA:	No. 71-C-331
SLEEPY'S, INC.;	No. 71-C-332
FRED KAUZRICH;	No. 71-C-333
JEANETTE STENZEL;	No. 71-C-334
CHARLES WIGINTON;	No. 71-C-352
RICHARD A. MISURELLI and TERRANCE MC CUE;	No. 71-C-316
GO-GO OF RACINE, INC., A Wisconsin Corporation, THEODORE F. WITHERIL, and JEROME J. RUETZ, JR.; and	No. 71-C-317
DAVID H. ROBERS;	No. 71-C-335

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

APPEAL DOCKETED OCTOBER 28, 1972

PROBABLE JURISDICTION NOTED JANUARY 8, 1973



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICHARD A. MISURELLI
and TERRANCE MC CUE,
Plaintiffs,

vs.

Civil Action
No. 71-C-316

CITY OF RACINE,
a Wisconsin Municipal Corporation,
Defendant.

4	6/25/71	Complaint.
11	6/30/71	Plaintiffs' motion for ex parte mandatory injunctive relief with affidavit of Terrance McCue.
14	6/30/71	Amended complaint.
48	7/2/71	Temporary restraining order to City of Racine to issue liquor licence to plaintiffs.
52	7/8/71	Defendant's motion to vacate temporary restraining order with supporting affidavit.
75	7/16/71	Defendant's reply to request for admis-mission of facts.
87	7/21/71	Plaintiffs' request of defendant for admis-mission of facts.

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93	7/21/71	Plaintiffs' response to defendant's request for admission of facts.
94	7/23/71	Answer.
101	7/26/71	Defendant's motion to modify temporary restraining order entered on 7/2/71.
103	7/30/71	Decision and order denying defendant's motion to vacate the temporary restraining order and further denying defendant's motion to modify temporary restraining order.
108	9/21/71	Amended complaint challenging constitutionality of Wisconsin Statutes.
115	9/21/71	Stipulation of facts filed by the parties.
125	10/21/71	Memorandum opinion and order that temporary restraining order outstanding is continued until further order of the court.
127	11/4/71	Order designating the Honorable Thomas E. Fairchild, the Honorable Myron L. Gordon, and the Honorable John W. Reynolds as members of a three-judge court.
130	12/16/71	Motion of Robert Warren, Attorney General of Wisconsin, to intervene as a party defendant.
133	12/17/71	Order granting leave to Robert Warren, Attorney General of Wisconsin, to intervene and be made a party defendant.
141	3/31/72	Defendant's answer to amended complaint.
151	4/7/72	Plaintiffs' motion for summary judgment.

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156	4/10/72	Defendant's motion for summary judgment.
158	4/17/72	Motion of intervening defendant for summary judgment.
164	8/2/72	Decision and order.
177	8/14/72	Judgment.
179	9/1/72	Notice of appeal.

SLEEPY'S, INC.,
Plaintiff,

vs.

Civil Action
No. 71-C-332

CITY OF KENOSHA,
a Wisconsin Municipal Corporation,
Defendant.

189	6/29/71	Complaint.
199	7/2/71	Temporary restraining order to City of Kenosha to issue liquor license to plaintiff.
282	7/23/71	Answer and affirmative defense.
286	7/30/71	Decision and order denying defendant's motion to vacate temporary restraining order and defendant's motion to modify temporary restraining order.

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290	10/21/71	Memorandum opinion and order that temporary restraining order outstanding is continued until further order of the court.
315	3/22/72	Motion of defendant that temporary restraining order entered on 7/2/71 be modified.
329	4/7/72	Plaintiff's motion for summary judgment.
339	4/21/72	Plaintiff's amended complaint challenging constitutionality of Wisconsin Statutes.
346	8/2/72	Decision and order.
350	8/14/72	Judgment.
352	9/1/72	Notice of appeal.

14 **AMENDED COMPLAINT. Filed June 30, 1971.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICHARD A. MISURELLI and
TERRANCE MC CUE,
Plaintiffs,

vs. Case No. 71-C-316

CITY OF RACINE,
a Wisconsin Municipal Corporation,
Defendant.

PARTIES

1. That your plaintiff, Terrance McCue is an adult citizen of the United States of America.

2. That your plaintiff, Richard A. Misurelli is an adult resident of the United States of America.

3. That the plaintiffs above captioned are adult citizens of the City of Racine, County of Racine, State of Wisconsin.

4. That the defendant above captioned is a municipal corporation organized, licensed, and existing under the constitution and statutes of the State of Wisconsin.

5. That all parties are residents and are physically located in the Eastern Judicial District of the United States District Court for Wisconsin.

JURISDICTION

6. That the plaintiffs' causes of action arise under Title 42 of the United States Code, Sections 1983, and 1985, and this Court has jurisdiction of their action under Title 28 in the United States Code, Sections 1331, 1332, and 1343.

PLAINTIFFS' FIRST CAUSE OF ACTION

7. That at all times pertinent thereto, plaintiffs were the owners and operators of the Pussy Cat Lounge, and the owners of a Class "B" Retail Femented Malt Beverage and Intoxicating Liquor License.

8. That the business of the Pussy Cat Lounge is that commonly referred to as a tavern and survives primarily by virtue of the dispensation of fermented malt beverages and intoxicating liquors.

9. That during the license year 1970-1971, said Class "B" license was held in the name of the plaintiff, McCue, subject to the partnership interest of the plaintiff, Richard Misurelli.

10. That during said license year, application was duly, properly, and timely made for a Class "B" retail fermented malt beverage and intoxicating liquor license for the license year 1971-1972 by the plaintiff, Misurelli, for the purposes of the continuation of the partnership business, and the defendant was so informed in all such respects.

11. That on 1 June, 1971, the Common Council of the City of Racine acted to deny the said application for said license to your plaintiffs, no further action by other branches of defendant government having been taken, and this such action having been regarded as vital by the defendant.

12. That at all times pertinent hereto, the defendant has acted under color of state law, basing its actions on its ordinances and the prescriptions and permission granted to-wit to do so by Section 66.054 and Chapter 176 of the Statutes of the State of Wisconsin.

13. That defendant city denied the said license in question, without —

a. Affording plaintiffs a hearing;
b. Taking of sworn testimony;
c. Notice of some council committee meetings at which discussions on the subject of plaintiffs' application were had;
d. The right of confrontation;
e. The right of cross-examination;
f. The making of a record for review;
g. The opportunity to present sworn testimony;
h. Notice of objections or complaints which would be considered by the defendant city in its decision making process with reference to the said license application by plaintiffs.

16 14. That the defendant city acted without any perceptible standards in denying the license.

PLAINTIFFS' SECOND CAUSE OF ACTION

15. That the plaintiffs in their business feature dancing as a mode of expression. That such dancing features various types of costuming, depending upon the expression each performer wishes to convey. That such dancing also features nudity or the absence of costuming for the same purpose.

16. That the plaintiffs are informed and verily believe that the defendant city denied the license for the plaintiffs because plaintiffs permitted this conduct, which is protected by the First Amendment.

17. That the defendant city by such denial of the license was illegally using its licensing power for the purpose of censoring conduct which it deemed undesirable and objectionable. That the city made such determination without any prior judicial adversary proceeding finding such conduct obscene.

18. That by reason of such acts of censorship by the City of Racine, the plaintiffs have been deprived, under color of law and under customs and usages of the State of Wisconsin, of their right of freedom of speech and expression as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

19. That the defendant has denied plaintiffs due process of law to the irreparable detriment of the plaintiffs.

20. That such denial effectively denied plaintiffs the ability to continue in the tavern business as of 1 July, 1971, because the present license held by plaintiffs expires 30 June, 1971.

21. That the plaintiffs have an investment in their business in excess of $20,000.00 and face emminent irreparable damage and injury.

22. That plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray that the Court grant judgment as follows:

a. A permanent mandatory injunction ordering the defendant to issue a Class "B" Fermented Malt Beverage and Intoxicating Liquor license to the plaintiffs upon payment by the plaintiffs of all appropriate fees.

b. A temporary mandatory restraining order and/or preliminary mandatory injunction ordering the defendant to issue a Class "B" Fermented Malt Beverage and Intoxicating Liquor license to the plaintiffs upon payment of appropriate fees by plaintiffs to the defendant during the pendency of this action.

c. An immediate, emergency hearing to determine why the defendant should not be ordered to issue a Class "B" Fermented Malt Beverage and Intoxicating Liquor license as prayed for in Paragraph (b) herein.

d. Allowance to plaintiffs of their costs herein, including reasonable attorneys' fees, disbursements, and such other relief as to the Court seems meet.

Respectfully submitted,

By: */s/ Victor C. Cairo,*
Victor C. Cairo,
Attorney for Plaintiffs

/s/ Jay Schwartz
Jay Schwartz,
Of Counsel

18 STATE OF WISCONSIN)
) SS
RACINE COUNTY)

Terrance McCue, being first duly sworn, on oath deposes and says that he is one of the plaintiffs in the above action, that he has read the foregoing Amended Complaint and knows its contents and that the same is true to his own knowledge, except as to those matters alleged on information and belief, and as to those matters he believes it to be true.

/s/ Terrance McCue

Subscribed and sworn to before me
this *28* day of June, 1971.

/s/ Victor C. Cairo
Notary Public, Racine County, Wisconsin
Permanent Commission

48 **TEMPORARY RESTRAINING ORDER TO CITY OF RACINE TO ISSUE LIQUOR LICENSE TO PLAINTIFFS. Filed July 2, 1971. (Title omitted in printing.)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The motion for a temporary mandatory restraining order having regularly come before the Federal District Court for the Eastern District of Wisconsin at 4:00 o'clock in the afternoon of June 30, 1971:

On reading the affidavits, briefs and the verified complaint of the plaintiffs in support of the motion and the affidavits of the defendant in opposition thereto, and after hearing

Victor C. Cairo, Esq., attorney for the plaintiffs, and Mr. Edward Krenzke, Deputy City Attorney, attorney for the defendant in opposition to the motion:

IT IS ORDERED that City of Racine shall issue forthwith upon the tender of appropriate fees, a Class "B" Retail Fermented Malt Beverage and Intoxicating Liquor License to Richard Misurelli and Terrance Mc Cue, to take all necessary steps to effectuate the same, until further order of the Court.

Dated at Milwaukee, Wisconsin, this *2d* day of July, A.D., 1971. *Nunc pro tunc June 30, 1971.*

BY THE COURT:

/s/ John W. Reynolds
United States District Judge

94 **ANSWER OF DEFENDANT, CITY OF RACINE. Filed July 23, 1971. (Title omitted in printing.)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Now comes defendant, City of Racine, by its attorneys, Jack Harvey and Edward A. Krenzke, City Attorneys, and in answer to plaintiffs' Complaint in the above entitled matter, admits, denies and alleges as follows:

FIRST: In answer to paragraphs 1, 2, 3, 4, 5, 7, 8, 11, 12 and 16 admits the allegations therein contained.

SECOND: In answer to paragraph 6 of plaintiffs' complaint, the defendant denies that this Court has jurisdiction of plaintiffs action.

THIRD: In answer to paragraph 9 of plaintiffs' complaint, defendant denies that during the license year 1970-71 that a Class "B" Liquor License was held by plaintiff Mc Cue, subject to the partnership interests of the plaintiff Misurelli. And in further answer to said paragraph 9, defendant alleges that the Class "B" Liquor License for 1970-71 was issued to Terrance Mc Cue individually, and that Terrance Mc Cue's application for such license was filed with the City
95 Clerk of the City of Racine and did not disclose the existence of any partnership between plaintiff Mc Cue and Misurelli, nor that the said applicant was acting as agent or employee for any other person, and that under Wisconsin law any such partnership arrangement is void as it relates to any interests in said liquor license. In further answer to said paragraph 9, defendant alleges that plaintiff Misurelli made application for a liquor license for the year 1971-72, and in such application did not disclose the existence of any partnership, nor that he was acting as agent or employee for any other person, and that under Wisconsin law any such partnership arrangement is void as it relates to any interest in said liquor license.

FOURTH: In answer to paragraph 10 of plaintiffs' Complaint, defendant admits that application was made by plaintiff Misurelli for a Class "B" Liquor License for the license year 1971-72, but denies that said application was made for the purpose of the continuation of any partnership. In further answer to said paragraph 10, defendant alleges that plaintiff Misurelli made application in his name only and did not disclose the existence of any partnership, and denies that defendant was informed of the existence of any partnership.

FIFTH: In answer to paragraph 13 of plaintiffs' Complaint, defendant denies the allegations therein contained and alleges that plaintiff Misurelli's application was a new application for a liquor license for the year 1971-72, and that said application was considered in accordance with the provisions of Section 176.05, as such statute was construed by the Wisconsin Supreme Court, particularly in the case of Ruffalo
96 vs. Kenosha, 38 Wis. (2d) 518, and that plaintiff Misurelli was afforded to public hearings, to-wit, May 11 and 25, 1971, and his attorney was given a third opportunity to be heard at a special committee meeting on June 1; and that said plaintiff Misurelli was present when objections were made concerning the granting of a license to him and was given opportunity to present testimony and witnesses in his own behalf, and that said hearings afforded plaintiff Misurelli were legislative type hearings and that a record was kept for review and that at all times was aware of the nature of the objections being made to the granting of his license; and in further answer to said paragraph 13, defendant alleges that pursuant to Section 176.05 as construed by the Wisconsin Supreme Court, he was afforded due process and that by virtue of his application for a license, he was on notice that a public hearing was to be had upon said application and that notice of such meetings were posted on the official bulletin board of City Hall, and were given newspaper and radio publicity.

SIXTH: In answer to paragraph 14 of plaintiffs' Complaint, defendant denies that it acted without any perceptable standards in denying said license, but acted in accordance with the provisions of Section 176.05 as that statute has been interpreted by the Wisconsin Supreme Court.

SEVENTH: In answer to paragraph 15 of plaintiffs' Complaint, defendant denies the allegations therein contained and alleges that plaintiffs were afforded due process of law pursuant to provisions of Section 176.05, Wis. Stats., as that statute has been interpreted by the Wisconsin Supreme Court.

97 EIGHTH: In answer to paragraph 17 of plaintiffs' Complaint, defendant alleges it has insufficient information so as to form a belief of the allegations therein contained, and therefore denies the same and puts plaintiffs to their proof. And in further answer to said paragraph, defendant alleges that plaintiffs interest in a liquor license is a privilege as distinguished from a property right and has no monitory value that can be considered as an investment.

NINTH: In answer to paragraph 18 of plaintiffs' Complaint, defendant denies the allegation therein contained and alleges that plaintiffs have an adequate remedy in the State Courts.

WHEREFORE, defendant prays for:

A. Complaint be dismissed

B. That defendant be awarded costs herein, including reasonable attorney's fees, disbursements, and such other relief as the Court seems just.

Dated this *21st* day of July, 1971.

Respectfully submitted,

/s/ Jack Harvey
Jack Harvey, City Attorney

/s/ Edward A. Krenzke
Edward A. Krenzke, Deputy City Att'y

Attorneys for Defendant
City Hall
730 Washington Avenue
Racine, Wisconsin

98 STATE OF WISCONSIN)
) SS.
COUNTY OF RACINE)

ALBERT A. REID, being first duly sworn, on oath deposes and says that he is the City Clerk of the City of Racine, the defendant in the above entitled action, and that as such he is authorized to make this oath on and behalf of the above named defendant; that he makes this vertification on behalf of the City of Racine; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and to those matters he believes it to be true.

/s/ Albert A. Reid
Albert A. Reid

Subscribed and sworn to before me
this 21st day of July, 1971.

/s/ Edward A. Krenzke
Notary Public, Racine County, Wisconsin
My Commission is permanent.

105 **DECISION AND ORDER DENYING DEFENDANTS' MOTION TO VACATE THE TEMPORARY RESTRAINING ORDER AND FURTHER DENYING DEFENDANT'S MOTION TO MODIFY TEMPORARY RESTRAINING ORDER. Filed July 30, 1971.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TERRANCE McCUE and
RICHARD MISURELLI, et al.
Plaintiffs,

v.

CITY OF RACINE,
a Wisconsin Municipal Corporation, et al.
Defendants.

In each of the above-captioned cases the plaintiffs are tavernkeepers who during the year June 1970-June 1971 held Class "B" Liquor Licenses and provided nude and semi-nude dancing entertainment in their taverns. They are suing the defendants because defendants refused to renew their liquor licenses for the year June 1971-June 1972. Plaintiffs allege that in proceeding under Chpater 176 of the Wisconsin Statutes, the defendants violated plaintiffs' First and Fourteenth Amendment rights and created a cause of action under Title 42 U.S.C. § 1983. Jurisdiction is alleged under Title 28 U.S.C. §§ 1331 and 1343.

In each case I have entered a temporary restraining order ordering the defendants to temporarily issue liquor licenses to the plaintiffs and maintain those licenses until further order of this court. The defendants have moved to vacate those temporary restraining orders or, alternatively, to modify them.

Based upon the pleadings, stipulated facts, briefs, and representations of counsel, and after a hearing held in this matter on July 26, 1971, and for reasons which will be elaborated on in a written opinion which will be filed, I have
106 concluded that I should request the convening of a three-judge court to consider the constitutionality of the pertinent provisions of Chapter 176 of the Wisconsin Statutes. Pending the convening of the three-judge court,

IT IS ORDERED that defendants' motion in each case to vacate the temporary restraining order be and it hereby is denied.

IT IS FURTHER ORDERED that defendants' motion in each case to modify the temporary restraining order be and it hereby is denied without prejudice.

Dated at Milwaukee, Wisconsin, this *29th* day of July, 1971.

/s/ John W. Reynolds
U.S. District Judge

108 **AMENDED COMPLAINT CHALLENGING CONSTITUTIONALITY OF WISCONSIN STATUTES. Filed September 21, 1971.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICHARD A. MISURELLI and
TERRANCE MC CUE,
Plaintiffs,

v. 71-C-316

CITY OF RACINE,
a Wisconsin Municipal Corporation,
Defendant.

PARTIES

1. That the plaintiffs, Terrance Mc Cue and Richard A. Misurelli, are adult citizens of the United States of America and adult residents and citizens of the city of Racine, Racine County, State of Wisconsin.

2. That the defendant above captioned is a municipal corporation organized, licensed and existing under the constitution and statutes of the State of Wisconsin.

3. That all parties are residents and are physically located in the Eastern Judicial District of the United States District Court for Wisconsin.

JURISDICTION

4. That the plaintiffs' causes of action arise under Title 42 of the United States Code, Sections 1983, and 1985, and this Court has jurisdiction of their action under Title 28 of the United States Code, Sections 1331, 1332, and 1343.

PLAINTIFFS' FIRST CAUSE OF ACTION

5. That at all times pertinent thereto, plaintiffs were
109 the owners and operators of the Pussy Cat Lounge, and the owners of a Class "B" Retail Fermented Malt Beverage and Intoxicating Liquor License.

6. That the business of the Pussy Cat Lounge is that commonly referred to as a tavern and survives primarily by virtue of the dispensation of fermented malt beverages and intoxicating liquors.

7. That during the license year 1970-1971, said Class "B" license was held in the name of the plaintiff, McCue, subject to the partnership interest of the plaintiff, Richard Misurelli.

8. That during said license year, application was duly, properly, and timely made for a Class "B" retail fermented malt beverage and intoxicating liquor license for the license year 1971-1972 by the plaintiff, Misurelli, for the purposes of the continuation of the partnership business, and the defendant was so informed in all such respects.

9. That on 1 June, 1971, the Common Council of the City of Racine acted to deny the said application for said license to your plaintiffs, no further action by other branches of defendant government having been taken, and this such action having been regarded as vital by the defendant.

10. That at all times pertinent hereto, the defendant has acted under color of state law, basing its actions on its ordinances and the prescriptions and permission granted to-wit to do so by Section 66.054 and Chapter 176 of the Statutes of the State of Wisconsin.

11. That defendant City denied the said license in question, without —

a. Affording plaintiffs a hearing;
b. Taking of sworn testimony;
c. Notice of some council committee meetings at which discussions on the subject of plaintiffs' application were had;
d. The right of confrontation;
e. The right of cross-examination;
f. The making of a record for review;
g. The opportunity to present sworn testimony;
h. Notice of objections or complaints which would be considered by the defendant city in its decision making process with reference to the said license application by plaintiffs.

12. That the defendant city acted without any perceptible standards in denying the license.

PLAINTIFFS' SECOND CAUSE OF ACTION

13. That the plaintiffs in their business feature dancing as a mode of expression. That such dancing features various types of costuming, depending upon the expression each performer wishes to convey. That such dancing also features nudity or the absence of costuming for the same purpose.

14. That the plaintiffs are informed and verily believe that the defendant city denied the license for the plaintiffs because plaintiffs permitted this conduct, which is protected by the First Amendment.

15. That the defendant city by such denial of the license was illegally using its licensing power for the purpose of censoring conduct which it deemed undesirable and objectionable. That the city made such determination without any prior judicial adversary proceeding finding such conduct obscene.

16. That by reason of such acts of censorship by the City of Racine, the plaintiffs have been deprived, under color of law and under customs and usages of the State of Wisconsin, of their right of freedom of speech and expression as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

111 17. That the defendant has denied plaintiffs due process of law to the irreparable detriment of the plaintiffs.

18. That such denial effectively denied plaintiffs the ability to continue in the tavern business as of 1 July, 1971, because the present license held by plaintiffs expires 30 June, 1971.

19. That the plaintiffs have an investment in their business in excess of $20,000.00 and face imminent irreparable damage and injury.

20. That the plaintiffs have no adequate remedy at law.

Page of Record

PLAINTIFFS' THIRD CAUSE OF ACTION CHALLENGING CONSTITUTIONALITY OF WISCONSIN STATUTES

21. That the defendant city, through its agents, employees, servants and officials, at all times mentioned herein, acted pursuant to and under color of Section 176.05 (1) and 176.05 (8) of Statutes of the State of Wisconsin.

22. That said acts of the defendant pursuant to said Statutes and under the color, custom and usage of the State of Wisconsin and the City of Racine as used and enforced against the plaintiff in denying them a liquor license have deprived the plaintiffs of their right to due process of law which is the accepted right of every citizen of the United States.

23. That said Statutes as so enforced and set forth above by the defendant against the plaintiff are unconstitutional for following reasons:

a. They deprive plaintiffs of their liberty and property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

b. They violate the procedural due process guarantees
112 of the 14th Amendment of the United States Constitution by permitting defendant to arbitrarily grant, deny or revoke the license of plaintiffs necessary to carry on their livelihood without according plaintiffs the right to a hearing or notice prior to said action on behalf of the defendant.

c. They violate the due process requirements of the Fourteenth Amendment to the Constitution of the United States by transferring judicial powers to ministerial and legislative officials.

d. That they are vague and overly broad and fail to contain any definite ascertainable standards or guidelines.

e. That said statutes violate the prohibition against bills of attainder guaranteed by Article I, par 9, cl 3 of the United States Constitution in permitting denial of a license by legislative instead of Judicial trial.

WHEREFORE, plaintiffs pray that the Court grant judgment as follows:

a. A permanent mandatory injunction ordering the defendant to issue a Class "B" Fermented Malt Beverage and Intoxicating Liquor license to the plaintiffs upon payment by the plaintiffs of all appropriate fees.

b. A temporary mandatory restraining order and/or
113 preliminary mandatory injuction ordering the defendant to issue a Class "B" Fermented Malt Beverage and Intoxicating Liquor license to the plaintiffs upon payment of appropriate fees by plaintiffs to the defendant during the pendency of this action.

c. An immediate, emergency hearing to determine why the defendant should not be ordered to issue a Class "B" Fermented Malt Beverage and Intoxicating Liquor license as prayed for in Paragraph (b) herein.

d. For a decision and ruling by a District Court of three Judges declaring Sections 176.05 (1) and 176.05 (8) unconstitutional and void under the United States Constitution as is required to be convened by Title 28, USC Section 2281 and Title 42 USC Section 1973c.

e. Allowance to plaintiffs of their costs herein, including reasonable attorneys' fees, disbursements, and such other relief as to the Court seems meet.

Respectfully submitted,

Victor C. Cairo
and
Jay Schwartz
Attorneys for Plaintiffs

114 STATE OF WISCONSIN)
RACINE COUNTY) SS

Richard Misurelli, being first duly sworn, on oath deposes and says that he is one of the plaintiffs in the above action, that he has read the foregoing Amended Complaint and knows its contents and that the same is true to his own knowledge, except as to those matters alleged on information and belief, and as to those matters he believes it to be true.

/s/ Richard Misurelli

Subscribed and sworn to before me
this 17th Day of September, 1971.

/s/ Victor C. Cairo
Notary Public, Racine County, Wisconsin
My Commission is permanent.

115 **STIPULATION OF FACTS FILED BY THE PARTIES ON SEPTEMBER 21, 1971. (Title omitted in printing.)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

It is hereby agreed by and between the plaintiffs and defendant herein, by their respective attorneys, Victor C. Cairo on behalf of the plaintiffs and Edward A. Krenzke on behalf of the defendant, that the following shall constitute agreed and stipulated facts in the above entitled case:

1. That Plaintiffs are adult citizens of the City of Racine, State of Wisconsin, and reside in the Eastern Judicial District of the United States District Court for Wisconsin.

2. That Defendant is a Wisconsin municipal corporation, located in the Eastern Judicial District of the United States District Court for Wisconsin.

3. That the business of the Plaintiffs is that commonly referred to as a tavern, and survives primarily by virtue of the dispensation of fermented malt beverages and intoxicating liquors.

116 4. That a Class "B" Retail Fermented Malt Beverage and Intoxicating Liquor license is a legal necessity for the operation of the tavern business of the Plaintiffs.

5. That Defendant, City of Racine, issued and maintained in effect a Class "B" Retail Fermented Malt Beverage and Intoxicating Liquor license in the name of Terrance McCue for the hereinbefore described premises throughout the license year 1970-1971.

6. That Plaintiff Richard Misurelli, pursuant to the provisions of Section 176.05, Wis. Stats., filed with Defendant's Clerk an appropriate and timely application for a Class "B" Retail Fermented Malt Beverage and Intoxicating Liquor License for the license year 1971-1972, with the appropriate fees, on or before 15 April, 1971.

7. That during said license year, application was duly, properly and timely made for a Class "B" Retail Fermented Malt Beverage and Intoxicating Liquor License for the license year 1971-1972 by the plaintiff Richard Misurelli for the purpose of the continuing the business known as the Pussy Cat Lounge.

8. That the application of Richard Misurelli on its face reveals no legal disability on the part of Plaintiffs to hold the license applied for.

9. That the application set forth the Plaintiffs' Richard Misurelli's desire to continue the operation of the previously established tavern business hereinbefore described.

10. That on June 1, 1971, the Common Council of the City of Racine acted to deny the said application for said license to your plaintiff, no further action by other branches of defendant government having been taken, and this such action having been regarded as final by the defendant.

117 11. That at all times pertinent hereto, the defendant has acted under color of State Law, basing its actions on its ordinances and the prescriptions and permissions granted, to-wit, to do so by Section 66.054 and Chapter 176 of the Statutes of the State of Wisconsin.

12. That no personal notice either written or oral was given to the plaintiff Misurelli of the License Committee Meetings or hearings of May 11 and May 25, 1971, or of the Racine Common Council Meeting of June 1, 1971. That oral notice was given to Counsel for Plaintiffs of the 6:30 meeting of hearing of the Licensing Committee of June 1, 1971; that the plaintiff Misurelli was the applicant, that the application was made pursuant to Section 176.05 of the Wisconsin Statutes which was in full force and effect.

13. That regular meetings of the Common Council of the City of Racine were fixed by Ordinance of the City to be held at the Council Chambers of City Hall on the 1st and 3rd Tuesday of each month; and that public notice of such meetings are given by posting notice of such meeting on the bulletin board in the main hall of City Hall on the day of such meeting; and that regular meetings of the License and Welfare Committee were fixed by Ordinance of the City to be held at City Hall on the 2nd and 4th Tuesday of each month; and that public notice of such meetings are given by posting notice of such meeting on the bulletin board in the main hall of City Hall on the day of such meeting. That May 4 and 18 and June 1 of 1971 were regularly scheduled meetings of the Common Council, and May 11 and 25, 1971 were regularly
118 scheduled meetings of the License and Welfare Committee of the Common Council. That at the Council Meeting of May 4, 1971, the application of Richard Misurelli for a retail liquor license for the year 1971-1972, along with numerous other license applications, were referred by the Common Council to the License and Welfare Committee as the duly authorized committee of the Common Council to conduct the annual license meetings required under Section 176.05 (8), Wis. Stats.

That following the public hearing conducted by the License and Welfare Committee the Deputy City Attorney was

instructed to prepare a written report based upon testimony given at the public hearings, setting forth the objections voiced against license applications, and was further instructed to present such draft to the committee at a special meeting to be called by the Chairman prior to the regular Common Council meeting to be held June 1, 1971. That a special License and Welfare Committee meeting was called for 6:30 p.m., June 1, 1971, and prior to the Common Council meeting set for 8 p.m. the same date; that at such committee meeting all members were present to consider the draft of the report and upon motion duly adopted, it was voted to report and recommend that the license application of Richard Misurelli, along with two others, be denied and the reason therefore be as set forth in Exhibit "A" attached.

14. That dates of such meetings were posted on the bulletin board of the City Hall and announcements of such meetings were made via radio and newspapers.

15. That written complaints and objections contained in the License Committee Report and Recommendation
119 recommending denial of the license application of Richard Misurelli were never made known to Misurelli or his attorney prior to the Council meeting of June 1, 1971 although plaintiff Misurelli heard the objections made at the hearings held on May 11 and 25, 1971; that Misurelli learned of the written objections to granting of this application contained in said Report and Recommendation after it was presented to the Common Council at its meeting of June 1, 1971.

16. That the applicant Misurelli was present at the License Committee Meetings of May 11 and 25, 1971, and did speak at said meetings.

17. That no license applications, including the specific application of the plaintiff Misurelli was called up for con-

sideration by the Chairman of the Licensing Committee or any member thereof at either of the Committee hearings of May 11, 1971, or of May 25, 1971. That no vote was taken at either of these two meetings on the license application of the plaintiff Misurelli.

18. That on June 1, 1971, the defendant's Common Council voted to deny the license of the Plaintiff Misurelli to continue in the tavern business, the record of such proceedings is set forth in Exhibit "A" attached hereto.

19. That the City did not issue a Class "B" Retail Fermented Malt Beverage and Intoxicating Liquor license to your plaintiff Misurelli and threatens to continue to withhold such license unless ordered to the contrary by this Court.

20. That at all meetings all persons, including plaintiff or his attorney, were given an opportunity to speak.

120 21. That at all of the meetings no speaker was sworn in or placed under oath before speaking.

22. That none of testimony or speeches at any of the meetings was recorded by a phonographic reporter so that a transcript thereof could be made.

23. Plaintiff was not advised that he could question or cross-examine any of the speakers. Plaintiff made no request to cross-examine any of the speakers.

24. That plaintiff received personally no other notice than as set forth herein.

25. That plaintiff features, as part of a tavern operation, live entertainment in the form of female professional dancers.

26. That such dancers perform both in costumes and nude.

27. That all hearings held by the defendant were legislative in nature, and there were discussions from the audience on various items such as matters were raised concerning the operation of plaintiff establishments and their effect on the City.

28. That the license application of Richard Misurelli was denied by reason of his method and manner of the operation of the Pussy Cat Lounge during the license year 1970-1971 as set forth in the Resolution of the Licensing Committee presented to the City Common Council.

29. That no enforceable obscenity standard has been established or articulated by the defendant City as to nude dancing entertainment on licensing to dispense liquor, and that Chapter 944 of the Wisconsin Statutes was in full force
121 and effect during the 1970-1971 license year, and continue to be in force and effect, and could have a bearing on the privilege of holding a license to dispense liquor.

30. That for purposes of public hearings the three applicants for licenses, Richard Misurelli, David Robers, Go-Go of Racine, Inc., were segregated out from the other applicants and were handled as a group. That the only specification or charge by either the City Council or the License Committee officially given to the plaintiff Misurelli was contained in the Report and Recommendation as the reasons for denial of the application as required by Section 176.05 (8), Wis. Stats.

31. That all of the hearings held by the defendant City were legislative type trials, and that none of said hearings were trial-type hearings in which speakers were placed under oath, cross-examined or any record made of such speeches.

32. That the Plaintiff Misurelli's method and manner of doing business during the year 1970-1971 contained in the License Committee Report and Recommendation recommending denial of his license application refers in part to the nude

dance entertainment offered by the Pussy Cat Lounge during said period. That the defendant City relied on such dance entertainment as one of the factors producing the effects enumerated in paragraphs (a) through (f) of said Resolution in denying of the license application of Misurelli.

33. That Alderman Frank Barry, Chairman of the Licensing Committee, was aware that Misurelli had some ownership interest in the Pussy Cat Lounge during the license year 1970-1971, (although counsel objects to the materiality of this stipulated fact).

122 Dated this *16* day of September, A.D., 1971.

/s/ Victor C. Cairo
Victor C. Cairo
Attorney for the Plaintiff

/s/ Edward A. Krenzke
Edward A. Krenzke
Attorney for the Defendant

123 EXHIBIT A

TO THE HON. MAYOR AND COMMON COUNCIL:

Your Committee on LICENSE & WELFARE to whom was referred Item 21 (6) of May 18 being item 11 D of May 4, 1971 being the following applications for Class B Retail Fermented Malt Beverage and Intoxicating Liquor License:

Go-Go of Racine Inc.	201 Main Street
Richard A. Misurelli	1209 Douglas Avenue
Dave H. Robers	1814 - 16th Street

Respectfully report and recommend — That after two public hearings, and based upon testimony submitted at such hearings, each of the above applicants, by reason of their method and manner of operation of their business during the license

year 1970-71, have contributed substantially to the creation of the following conditions within and/or concerning the City:

a) A change of reputation of the City of Racine from that of a "City of Advantages" to that of a city of ill repute.

b) An atmosphere that now attracts into the community an undesirable element which has fostered an increase of prostitution, promiscuity and VD.

c) A sensitivity on the part of the community to the indecent activity within the premises which now discourages residents from having relatives and friends visit the City.

d) A sensitivity on the part of residents to indecency within the premises that has adversely effected family and home life of the community and which now causes concern on the part of parents for the moral well-being of their children.

e) An atmosphere of fear and concern on the part of citizens for the activity that goes on in these premises and which now causes them to refrain from entering business districts where these premises are located, and in turn causing loss of patronage to other merchants in the area.

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CHAIRMAN OF COMMITTEE

124 REPORT BY

LICENSE & WELFARE
COMMITTEE

3 applications for Class B Retail
Fermented Malt Beverage & Intoxicating
Liquor License 1971-1972

f) That there have been complaints of feuding between the management of two of the premises (Pussy Cat and Tubby's) and threats of violence between the two; also, there exists complaints against one of the premises (Tubby's) of having patrons physically ejected when the patron failed to spend sufficient money across the bar; as well as complaints of minors in two of the premises (Tubby's and Pussy Cat).

That, therefore, in the best interest of the welfare and morals of the community, it is recommended that these license applications be denied.

Your committee further recommends that in view of the objections voiced to the issuance of licenses to organizations whose by-laws contain exclusionary clauses, all Club Licenses and all Class "B" Licenses issued to organizations whose by-laws contain exclusionary clauses, for license year 1971-72, are subject to review and reconsideration upon issuance of the expected decision from the United States Supreme Court as to the effect of "exclusionary clauses" on the subject matter of issuance of liquor licenses.

125 **MEMORANDUM OPINION AND ORDER THAT TEMPORARY RESTRAINING ORDER OUTSTANDING IS CONTINUED UNTIL FURTHER ORDER OF THE COURT. Filed October 21, 1971.**

This opinion and order is printed in the Appendix to the Jurisdictional Statement at pages 112-113.

133 **ORDER GRANTING LEAVE TO ROBERT W. WARREN, ATTORNEY GENERAL OF WISCONSIN, TO INTERVENE AND BE MADE A PARTY DEFENDANT. Filed December 17, 1971.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BRUNO, et al., v. CITY OF KENOSHA, et al.

Plaintiffs in the above-captioned actions have challenged the constitutionality of section 176.05 of the Wisconsin Statutes.

Robert W. Warren, as Attorney General of the State of Wisconsin, by George L. Frederick, Assistant Attorney General, State of Wisconsin, has moved to intervene as a party defendant in the above-captioned actions, claiming an interest in the subject of the litigation and a question of law in common with the impleaded defendants.

The motion is appropriate and in good order. Accordingly, IT IS THEREFORE ORDERED that Robert W. Warren, as Attorney General of Wisconsin, is hereby granted leave to intervene in the above-captioned actions and is made a party defendant for the purpose of litigating the question of law he has in common with the original defendants, the constitutionality of section 176.05 of the Wisconsin Statutes.

134 Dated at Milwaukee, Wisconsin, this *17th* day of December, 1971.

BY THE COURT:

/s/ John W. Reynolds
John W. Reynolds
District Judge

141 **DEFENDANT'S ANSWER TO AMENDED COMPLAINT. Filed March 31, 1972.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICHARD A. MISURELLI and
TERRANCE McCUE,
Plaintiffs,

v.

Case No.
71-C-316

CITY OF RACINE,
a Wisconsin Municipal Corporation,
Defendant.

Now comes defendant, City of Racine, by its attorneys, Jack Harvey and Edward A. Krenzke of the City Attorney's Office, and in answer to plaintiffs' Amended Complaint in the above entitled matter, admits, denies and alleges as follows:

FIRST: Admits the allegations in paragraphs 1, 2 and 3 of the Amended Complaint relating to the identity of parties.

SECOND: In answer to paragraph 4 of the Amended Complaint, defendant denies that Court has jurisdiction of plaintiffs' action.

THIRD: In answer to paragraph 5 of the Amended Complaint, defendant denies the allegations therein contained and in further answer thereto alleges that plaintiff

McCue was the holder of a Class "B" retail liquor license for the license year 1970-71 in his name only and that plaintiff Misurelli was an applicant for a Class "B" retail liquor license for the license year 1971-72 in his name only; and that the applications and records on file with the City Clerk of Racine show no interest on the part of plaintiff Misurelli, in the plaintiff McCue's license for the year 1970-71 and that the
142 same records show no interest on the part of plaintiff McCue in the license for which application was made by plaintiff Misurelli for the year 1971-72, and that under the Wisconsin scheme for issuing liquor licenses any claimed interest in such license not disclosed on the official records of the City are wholly irrelevant and not recognized for licensing purposes.

FOURTH: In answer to paragraph 6 of the Amended Complaint, defendant admits that all taverns survive primarily by virtue of the dispensation of intoxicating liquors, but alleges that Class "B" retail liquor licenses are issued to individuals or corporations personally rather than to premises, whether designated Pussycat Lounge or any other name, and that no retail liquor license has been issued to Pussycat Lounge.

FIFTH: In answer to paragraph 7 of the Amended Complaint, defendant admits that the Class "B" retail liquor license for the year 1970-71 was issued to plaintiff McCue, but denies that the same was subject to any partnership interest on the part of plaintiff Misurelli, and that the records on file in the office of the City Clerk of Racine, Wisconsin, show such license to have been issued to plaintiff McCue and without any financial interest by any other person.

SIXTH: In answer to paragraph 8 of the Amended Complaint, defendant admits that plaintiff Misurelli made application for a Class "B" retail liquor license for the year 1971-72, but denies that it was for the purpose of the continuance of any partnership business, and denies that defendant was so informed, and alleges that the application
143 for the liquor license for the year 1971-72, as made by plaintiff Misurelli, was made in his name only and asserted that no other person had any financial interest in such license.

SEVENTH: In answer to paragraph 9 of the Amended Complaint, defendant denies that the Common Council acted on June 1, 1971, to deny the application; and in further answer thereto alleges that the Common Council on June 15, 1971, denied the application of plaintiff Misurelli, there being no application by plaintiff McCue, upon which any action could be taken. And in further answer to said paragraph 9, defendant admits that after the denial on June 15, 1971, of the application for the license by plaintiff Misurelli that no further action was taken by defendant, and alleges that such action is final in the absence of plaintiff Misurelli seeking a review in a state court by way of certiorari and/or in the absence of plaintiff Misurelli pursuing his remedy in the state court pursuant to the provisions of Sec. 66.054 (14), all of which are provided under the Wisconsin statutory scheme of issuing retail liquor licenses.

EIGHTH: In answer to paragraph 10 of the Amended Complaint, defendant admits the allegations therein contained.

NINTH: In answer to paragraph 11 of the Amended Complaint, defendant alleges that it did not deny the Class "B" retail liquor license to plaintiff Misurelli in the manner

set forth in a through b; and in further answer thereto, affirmatively alleges that such license was denied after proceeding under the Wisconsin statutory scheme of issuing Class "B" retail liquor licenses, and in accordance with the decision of Ruffalo vs. Kenosha, 38 Wis. 2d 518, and after
144 having been presented with a report of its License and Welfare Committee which is hereto attached and marked Exhibit "A" and made a part hereof as though fully set forth.

In further answer to said paragraph 11, defendant alleges that plaintiff Misurelli sought no court review by way of certiorari in a state court of the reasons set forth in the Committee Report marked Exhibit "A", nor did plaintiff Misurelli petition any state court, pursuant to Sec. 66.054 (14), for a review of the evidence supporting the reasons set forth in the Committee Report marked Exhibit "A" hereto attached.

TENTH: In answer to paragraph 12 of the Amended Complaint, defendant denies that it acted without any perceptible standards.

And in answer to plaintiffs second cause of action set forth in their Amended Complaint in the above entitled matter, defendant admits, denies and alleges as follows:

ELEVENTH: In answer to paragraph 13 of the Amended Complaint, defendant admits the allegations therein set forth.

TWELFTH: In answer to paragraph 14 of the Amended Complaint, defendant denies that it rejected the license application of plaintiff Misurelli because of the nude dancing and alleges that its reasons for denial are fully set forth in Exhibit "A" hereto attached and made part hereof.

THIRTEENTH: In answer to paragraph 15 of the Amended Complaint, defendant denies that it was using its licensing power for the purpose of censoring conduct which it deemed undesirable and objectionable, and denies that it made any determination without any prior judicial adversary
145 proceeding finding of the obscene; and in further answer to said paragraph 15, alleges that it lawfully denied the license application of plaintiff Misurelli on the grounds set forth in Exhibit "A" hereto attached.

FOURTEENTH: In answer to paragraph 16 of the Amended Complaint, defendant denies that plaintiffs have been deprived, under color of law and under customs and usages of the State of Wisconsin, of any right of freedom of speech and expression as guaranteed by the First and Fourteenth Amendment of the Constitution of the United States.

FIFTEENTH: In answer to paragraph 17 of the Amended Complaint, defendant alleges that it has not denied plaintiffs due process of law to the irreparable detriment of plaintiffs.

SIXTEEN: In answer to paragraph 18 of the Amended Complaint, defendant admits the allegations therein set forth.

SEVENTEENTH: In answer to paragraph 19, defendant denies that plaintiffs have an investment of $20,000.00 or more in their business and denies that they face imminent irreparable damage and injury.

EIGHTEENTH: In answer to paragraph 20 of the Amended Complaint, defendant alleges that plaintiffs have an adequate remedy at law either by way of certiorari in the state courts, or by way of further administrative review under the provisions of Sec. 66.054 (14) of the Wis. Stats.

In answer to plaintiffs third cause of action as set forth in this Amended Complaint, defendant admits, denies and alleges as follows:

146 NINETEENTH: In answer to paragraph 21 of the Amended Complaint, defendant admits the allegations therein set forth and in addition, alleges that it has acted pursuant to the statutory scheme of issuing Class "B" retail liquor licenses as provided by Chapter 176 and Sec. 66.054 of the statutes of the State of Wisconsin, and the rulings of the Wisconsin Supreme Court in the case of Ruffalo vs. Kenosha, 38 Wis. 2d 518, and other Wisconsin Supreme Court decisions interpreting the provisions of Chapter 176 and Sec. 66.054, and especially subparagraph (14) therein.

TWENTIETH: In answer to paragraph 22 of the Amended Complaint, defendant denies that its acts pursuant to said statutes and under the color of law and under customs and usages of the State of Wisconsin, had deprived plaintiffs of their right and due process of law as guaranteed to them as a citizen of the United States.

TWENTY-FIRST: In answer to paragraph 23 of the Amended Complaint, defendant denies that the statute of laws as enforced and administered by defendant are unconstitutional for any of the reasons set forth in a through e of said paragraph 23.

WHEREFORE, defendant prays:

a. That the Court deny plaintiffs any mandatory injunction, requiring defendant to issue a Class "B" retail liquor license and further prays that the temporary mandatory restraining order now outstanding be dissolved.

b. Judgment dismissing plaintiffs Complaint.

c. Allowance to defendant of their costs herein, including reasonable attorneys' fees, disbursements, and such other relief as the Court may see fit.

147

Respectfully submitted,

JACK HARVEY
City Attorney
EDWARD A. KRENZKE
Deputy City Attorney

148

TO THE HON. MAYOR AND COMMON COUNCIL:

Your Committee on LICENSE & WELFARE to whom was referred Item 21 (6) of May 18 being item 11 D of May 4, 1971 being the following applications for Class B Retail Fermented Malt Beverage and Intoxicating Liquor License:

Go-Go of Racine Inc.	201 Main Street
Richard A. Misurelli	1209 Douglas Avenue
Dave H. Robers	1814-16th Street

Respectfully report and recommend — That after two public hearings, and based upon testimony submitted at such hearings, each of the above applicants, by reason of their method and manner of operation of their business during the license year 1970-71, have contributed substantially to the creation of the following conditions within and/or concerning the City:

a) A change of reputation of the City of Racine from that of a "City of Advantages" to that of a city of ill repute.

b) An atmosphere that now attracts into the community an undesirable element which has fostered an increase of prostitution, promiscuity and VD.

c) A sensitivity on the part of the community to the indecent activity within the premises which now discourages residents from having relatives and friends visit the City.

d) A sensitivity on the part of residents to indecency within the premises that has adversely effected family and home life of the community and which now causes concern on the part of parents for the moral well-being of their children.

e) An atmosphere of fear and concern on the part of citizens for the activity that goes on in these premises and which now causes them to refrain from entering business districts where these premises are located, and in turn causing loss of patronage to other merchants in the area.

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CHAIRMAN OF COMMITTEE

Exh. "A"

149 REPORT BY

LICENSE & WELFARE
COMMITTEE

3 applications for Class B Retail
Fermented Malt Beverages & Intoxicating
Liquor License 1971-1972

f) That there have been complaints of feuding between the management of two of the premises (Pussy Cat

and Tubby's) and threats of violence between the two; also, there exists complaints against one of the premises (Tubby's) of having patrons physically ejected when the patron failed to spend sufficient money across the bar; as well as complaints of minors in two of the premises (Tubby's and Pussy Cat).

That, therefore, in the best interest of the welfare and morals of the community, it is recommended that these license applications be denied.

Your committee further recommends that in view of the objections voiced to the issuance of licenses to organizations whose by-laws contain exclusionary clauses, all Club Licenses and all Class "B" Licenses issued to organizations whose by-laws contain exclusionary clauses, for license year 1971-72, are subject to review and reconsideration upon issuance of the expected decision from the United States Supreme Court as to the effect of "exclusionary clauses" on the subject matter of issuance of liquor licenses.

Exh. "A"

150 STATE OF WISCONSIN)
) ss.
COUNTY OF RACINE)

ALBERT A. REID, being first duly sworn, on oath deposes and says that he is the City Clerk of the City of Racine and that as such he is authorized to make this oath on and behalf of the above named defendant; that he makes this verification on behalf of the City of Racine; that he has read the foregoing Answer and knows the contents thereof,

and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and to those matters he believes it to be true.

/s/ Albert A. Reid
Albert A. Reid

Subscribed and sworn to before me
this 29th day of March, 1972.

/s/ Edward A. Krenzke
Notary Public, Racine County, Wisconsin
My Commission is permanent.

151 **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT WITH AFFIDAVIT. Filed April 7, 1972. (Title omitted in printing.)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TO: Edward Krenzke
Attorney for City of Racine

Earl Warren
Attorney General
State of Wisconsin

Please take notice that on the 21st day of April, 1972, at 9:00 o'clock in the morning, at the Court rooms of the the United States District Court, Milwaukee, Wisconsin, the undersigned as attorneys for the plaintiffs in the above actions, will move the Court for summary judgment in favor of the plaintiffs and against the defendants in the above entitled actions.

152 That said motion will be based on the attached Affidavit of Victor C. Cairo.

Dated this 5th day of April, 1972.

/s/ Victor C. Cairo
Victor C. Cairo

/s/ Jay Schwartz
Jay Schwartz

Attorneys for the Plaintiffs

153 STATE OF WISCONSIN)
RACINE COUNTY) ss.

Victor C. Cairo, being first duly sworn on oath, deposes and says that he is one of the attorneys for the plaintiffs in the above actions; that he makes this affidavit in support of plaintiffs' motion for summary judgment against the defendants in the above actions; that the plaintiffs are entitled to summary judgment on the following grounds:

1. That all the material facts in these cases are undisputed and have been stipulated to by the plaintiffs and defendants.

154 2. That the sole issues between the parties hereto are questions of law to be determined by this court.

3. That plaintiffs are entitled to judgment in their favor and against the defendants as a matter of law in accordance with the demands of their amended complaints.

/s/ Victor C. Cairo

Subscribed and sworn to before me
this 5th day of April, 1972.

/s/ Morris Shovers
Notary Public, Racine County, Wis.
My Term is Permanent.

156 **DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT WITH AFFIDAVIT. Filed April 10, 1972. (Title omitted in printing.)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TO: Victor C. Cairo
310 Fifth Street
Racine, Wisconsin

Jay Schwartz
704 Park Avenue
Racine, Wisconsin

Attorneys for Plaintiffs

Please take notice that on the 21st day of April, 1972, at 9:00 o'clock in the morning, at the Court rooms of the United States District Court, Milwaukee, Wisconsin, the undersigned as attorney for defendant in the above action, will move the Court for summary judgment in favor of the defendant and against the plaintiffs in the above entitled action

That said motion will be based on the attached Affidavit of Edward A. Krenzke.

Dated this 7th day of April, 1972.

/s/ Edward A. Krenzke
Edward A. Krenzke
Attorney for Defendant.

155 STATE OF WISCONSIN)
) ss.
RACINE COUNTY)

EDWARD A. KRENZKE, being first duly sworn on oath, deposes and says that he is one of the attorneys for

the defendant in the above action; that he makes this Affidavit in support of defendant's motion for summary judgment against the plaintiffs in the above action; that the defendant is entitled to summary judgment on the following grounds:

1. That all the material facts in this case are undisputed and have been stipulated to by the plaintiffs and the defendant.

2. That the sole issues between the parties hereto are questions of law to be determined by this Court.

3. That defendant is entitled to judgment in their favor and against the plaintiffs as a matter of law in accordance
157 with the demands of their Answer to the Amended Complaints.

/s/ Edward A. Krenzke
Edward A. Krenzke

Subscribed and sworn to before me
this 7th day of April, 1972.

/s/ Louis J. Roshar
Notary Public, Racine County, Wisconsin
My Commission is Permanent.

158 **NOTICE OF MOTION OF INTERVENING DEFENDANT FOR SUMMARY JUDGMENT WITH AFFIDAVIT. Filed April 17, 1972. (Title omitted in printing.)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TO: Mr. Jay Schwartz
Attorney at Law
704 Park Avenue
Racine, WI 53403

Mr. Victor C. Cairo
Attorney at Law
310 Fifth Street
Racine, WI 53403

Mr. Jerome J. Ruetz, Jr.
Go-Go of Racine, Inc.
P. O. Box 1051
Racine, WI 53405

Mr. Michael S. Fisher
Kenosha City Attorney
625 2nd Street
Kenosha, WI 53140

Mr. Edward A. Krenzke
Assistant City Attorney
City Hall
Racine, WI 53403

PLEASE TAKE NOTICE that, on the 21st day of April, 1972, at 9:00 in the morning, or at such other time as the court may direct, at the court rooms of the United States District Court, Milwaukee, Wisconsin, the undersigned as attorney for the intervening defendant, Robert W. Warren, Attorney General of Wisconsin, will move the court for summary judgment in favor of the intervening defendant and against the plaintiff in all the actions as captioned above.

159 The said motion will be based on the attached affidavit of George L. Frederick, Assistant Attorney General, State of Wisconsin.

Dated at Madison, Wisconsin, this 13th day of April, 1972.

ROBERT W. WARREN
Attorney General of Wisconsin

GEORGE L. FREDERICK
Assistant Attorney General

Attorneys for Intervening Defendant

P. O. Address:

114 East, State Capitol
Madison, Wisconsin 53702

160 STATE OF WISCONSIN)
) ss.
DANE COUNTY)

GEORGE L. FREDERICK, being first duly sworn on oath, deposes and says that he is an attorney for the intervening defendant, Robert W. Warren, Attorney General of Wisconsin, who has intervened in all the above captioned actions. The affiant makes this affidavit in support of the intervening defendant's motion for summary judgment against all the plaintiffs in all the above captioned actions. The affiant states that the intervening defendant is entitled to summary judgment on the following grounds:

1. The material facts in the above captioned actions are uncontroverted;

2. The sole issues between the parties hereto are questions of law to be determined by this court;

3. The intervening defendant is entitled to judgment in his favor and against all the plaintiffs in all the above captioned actions as a matter of law;

WHEREFORE, the intervening defendant prays that the court grant judgment as follows:

a. Deny all plaintiffs in the above captioned actions any mandatory injunction as prayed for by plaintiffs;

b. Dissolve the temporary mandatory restraining orders now outstanding;

c. Dismiss the complaints of all the plaintiffs in all the above captioned actions;

d. Allow to the intervening defendant his costs herein, including reasonable attorneys' fees, disbursements and such other relief as the court may see fit.

George L. Frederick
Assistant Attorney General
State of Wisconsin

(Jurat omitted in printing.)

164 **DECISION AND ORDER. FILED AUGUST 2, 1972.**

This decision and order is printed in the Appendix to the Jurisdictional Statement at pages 117-128.

177 **JUDGMENT. FILED AUGUST 4, 1972.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

PETER G. BRUNO, et al.

v.

CITY OF KENOSHA,
a Wisconsin Municipal Corporation, et al.

This action came on for hearing on cross motions for summary judgment before the Court, Honorable Thomas E. Fairchild, Judge, U.S. Court of Appeals for the Seventh Circuit, John W. Reynolds, Chief Judge, U.S. District Court, ED of Wisconsin, Myron L. Gordon, Judge, U.S. District
178 Court, ED of Wisconsin, presiding, and the issues having been duly heard, and a decision having been duly rendered, and the court having granted plaintiffs' motion for summary judgment.

IT IS ORDERED that 176.05 (1) and 176.05 (8), of the Wisconsin Statutes, insofar as they permit renewal of liquor licenses to be denied without permitting the applicants an opportunity for an adversary-type hearing in which the applicant is given timely notice of the reasons urged for denial and an opportunity to present, confront, and cross-examine witnesses under oath with a verbatim transcript, be and they hereby are declared unconstitutional.

IT IS FURTHER ORDERED that the defendant City of Kenosha/Racine is enjoined from denying any application for

the renewal of a liquor license as long as 176.05 (1) and 176.05 (8) of the Wisconsin Statutes fail to require a hearing meeting the standards of due process set forth in the opinion.

IT IS FURTHER ORDERED that until such time as plaintiffs' license applications are acted upon in a manner commensurate with the due process clause of the Fourteenth Amendment as set forth in the opinion, the defendant City of Kenosha-Racine shall grant plaintiffs Class "B" Fermented Malt Beverage and Intoxicating Liquor Licenses.

DATED AT MILWAUKEE, WISCONSIN, this 14th day of August, 1972.

/s/ Ruth W. La Fave
Clerk of Court

179 **NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES. Filed September 1, 1972.**

The notice of appeal is printed in the Appendix to the Jurisdictional Statement at page 131.

199 **TEMPORARY RESTRAINING ORDER TO CITY OF KENOSHA TO ISSUE LIQUOR LICENSE. Filed July 2, 1971.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SLEEPY'S, INC.,
Plaintiff,

-vs- 71-C-332

CITY OF KENOSHA,
Defendant.

The motion for a temporary mandatory restraining order having regularly come before the Federal District Court for the Eastern District of Wisconsin at 4:00 o'clock in the afternoon of June 30, 1971:

On reading the affidavits, briefs and the verified complaint of the plaintiff in support of the motion and the affidavits of the defendant in opposition thereto, and after hearing Mr. Jay Schwartz, Esq., attorney for the plaintiff, and Mr. Mike Fisher, Esq., attorney for the defendant in opposition to the motion:

IT IS ORDERED that City of Kenosha shall issue forthwith upon the tender of appropriate fees, a Class "B" Retail Fermented Malt Beverage and Intoxicating Liquor License to Sleepy, Inc, and to take all necessary steps to effectuate the same, until further order of the Court.

Dated at Milwaukee, Wisconsin, this *2d* day of July, A.D., 1971. *Nunc pro tunc June 30, 1971.*

BY THE COURT:

/s/ John W. Reynolds
United States District Judge

282 **ANSWER AND AFFIRMATIVE DEFENSE. Filed July 23, 1971. (Title omitted in printing.)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Now comes the defendant by its attorneys, Michael S. Fisher and Terry L. Constant, in answer to the complaint of the plaintiff respectfully admits, denies and alleges as follows:

1. Answering paragraphs 1 through 3; admits the allegations contained therein.

2. Answering paragraph 4; denies the allegations contained therein and puts plaintiff to its proof.

3. Answering paragraphs 5 through 8; admits the allegations contained therein.

4. Answering paragraph 9; denies that the Common Council acted to deny its license on June 14, 1971, and alleges said act took place on June 7, 1971.

5. Answering paragraph 10; admits the allegations contained therein.

6. Answering paragraph 11; admits and denies as follows: denies the allegations contained in a., c., d., e., f. and h. and puts plaintiff to its proof. Admits the allegations in

b. and g. as to the fact that no person was sworn prior to speaking but alleges that plaintiff was given the opportunity and did, either personally or through its attorney, testify.

7. Answering paragraph 12; denies the allegations con-
283 tained therein and puts plaintiff to its proof.

8. Answering paragraph 13; admits plaintiff features dancing and also features nudity but alleges insufficient knowledge or information upon which to form a belief that said dancing and costuming is a means of expression and therefore puts plaintiff to its proof.

9. Answering paragraphs 14 through 16; denies the allegations contained therein and puts plaintiff to its proof.

10. Answering paragraph 17; alleges insufficient information or knowledge upon which to form a belief and therefore puts plaintiff to its proof.

11. Answering paragraph 18; denies the allegations contained therein and puts the plaintiff to its proof.

12. Answering paragraph 19; admits that the denial of said license denied plaintiff the right and ability to operate a tavern but denies any inference that said denial was illegal or tainted.

13. Answering paragraph 20; alleges insufficient knowledge or information upon which to form a belief and therefore puts plaintiff to its proof.

14. Answering paragraph 21; denies the allegations contained therein and puts plaintiff to its proof.

AFFIRMATIVE DEFENSE

Now comes the defendant by its attorneys, Michael S. Fisher and Terry L. Constant, by way of affirmative defense alleges as follows:

1. That defendant has acted under the authority of Chapter 176 of the Laws of the State of Wisconsin, pursuant to the delegation of power granted to the defendant municipality by the State of Wisconsin authorizing the issuance of licenses for the dispensing of liquor and beer.

2. That defendant did afford the plaintiffs legislative hearings which plaintiffs attended, all in accordance with the
284 requirements of Chapter 176 of the Laws of the State of Wisconsin, as interpreted by the legislature of the State of Wisconsin and the Wisconsin Supreme Court.

3. That plaintiff refused to remain at the public hearing on May 21, 1971, at which time subject license was considered before the Committee on Finance, thereby waiving its right to be heard.

4. That no plaintiff, except Fred Kauzrich and Bruce Bleashka, availed themselves of the opportunity to be heard at a public hearing on June 21, 1971, prior to voting on the issue of reconsideration of the vote taken on June 21, 1971.

5. That plaintiff had notice of every meeting held at which its license could be considered by virtue of the statutory procedure for licensing as set forth in Chapter 176 of the Wisconsin Statutes, written notice, verbal notice, or, all three and plaintiff and/or legal counsel for plaintiff did appear

at every meeting at which its license was discussed and was given the opportunity to be heard.

MICHAEL S. FISHER and
TERRY L. CONSTANT,
Attorneys for the Defendant

285 STATE OF WISCONSIN)
) SS.
COUNTY OF KENOSHA)

MICHAEL S. FISHER, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendant in this action; that he was directed and authorized by the defendant to plead in this action; that he has read the above and foregoing Answer and Affirmative Defense, knows the contents thereof, and the facts therein stated are true to his own knowledge and belief, except as to those matters stated on information and belief and to those matters he believes them to be true; that the basis of his information and belief is from documents, reports and personal knowledge and that he is authorized to execute this verification on behalf of the defendants in this action.

/s/ Michael S. Fisher
MICHAEL S. FISHER

Subscribed and sworn to before me
this *22nd* day of *July*, 1971.

/s/ Nellie Repka
Notary Public, Kenosha County, Wis.

My Commission Expires: *3-4-74*

315 **MOTION OF DEFENDANT, WITH SUPPORTING AFFIDAVITS, THAT TEMPORARY RESTRAINING ORDER ENTERED ON JULY 2, 1971, BE MODIFIED. Filed March 22, 1972. (Title omitted in printing.)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Now comes the defendant in the above entitled action by its attorney, Michael S. Fisher, City Attorney for the City of Kenosha, Wisconsin, and moves the Court on the basis of the attached Affidavit as follows:

That the Temporary Restraining Order entered on July 2, 1971, in the above entitled action be modified and lifted so as to permit the Common Council of the City of Kenosha, pursuant to Sections 176.11 and 176.12 WIS. STATS., to act upon a complaint filed with the City Clerk of the City of Kenosha by Joseph H. Trotta on the 14th day of March, 1972.

/s/ Michael S. Fisher
Michael S. Fisher,
City Attorney,
Kenosha, Wisconsin.

316 STATE OF WISCONSIN)
) ss: *AFFIDAVIT*
COUNTY OF KENOSHA)

Gail F. Procarione, being first duly sworn, on oath deposes and says:

1. That he is City Clerk of the City of Kenosha, Wisconsin.

2. That heretofore on the 2nd day of July, A.D., 1971, the following Temporary Restraining Order was issued in Civil Action entitled *Sleepy's Inc.* vs. *City of Kenosha* being Civil Action No. 71-C-332,

> "IT IS ORDERED that City of Kenosha shall issue forth with upon the tender of appropriate fees, a Class "B" Retail Fermented Malt Beverage and Intoxicating Liquor License to Sleepy, Inc. and to take all necessary steps to effectuate the same, until further order of the Court."

3. That the City of Kenosha has been ordered by the Court to issue and maintain those licenses until further order of the Court.

4. That on the 14th day of March 1972, there was filed with this office by Joseph H. Trotta the attached Complaint in Affidavit form and that thereafter said Complaint was brought before the Common Council on March 20, 1972, and on said date said Common Council, after due consideration of said Complaint adopted the following motion:

> "That a revocation hearing be held on April 13, 1972, at 7:00 P.M. in Council Chambers in the Municipal Building, 625 - 52nd Street, Kenosha, Wisconsin, and in accordance with State Statutes, a court reporter shall be present and the license holder shall be permitted to present witnesses and testify on his behalf and cross examine all witnesses presented on behalf of the City; the holding of said hearing shall be contingent on modification of the outstanding Court Order.

317 Further, That City Attorney be directed to petition the Court to modify the Restraining Order in order to proceed with the hearing on the Complaint as provided by law."

5. That copies of said charges have been sent to the license holder and to his attorney so that they may be informed as to the specific charges.

That this Affidavit is made for the purpose of supporting a Motion to modify the Temporary Restraining Order heretofore issued on the 2nd day of July, 1971, as it relates to Sleepy's Inc.

/s/ Gail F. Procarione
Gail F. Procarione,
City Clerk,
City of Kenosha

Subscribed and sworn to before me
this *21st* day of March, 1972.

/s/ Michael S. Fisher
Notary Public, Kenosha County, Wisconsin.

My Commission: *Permanent*

318 STATE OF WISCONSIN)
) SS. *AFFIDAVIT*
KENOSHA COUNTY)

JOSEPH H. TROTTA, being first duly sworn, on oath deposes and says:

First: That he is the Inspector of Police for the City of Kenosha, Wisconsin, and is a resident of the City

of Kenosha, Kenosha County, State of Wisconsin, and is over twenty-one (21) years of age.

Second: That presently at the premises located at 5629 - 24th Avenue in the City of Kenosha, Wisconsin, there is a business establishment known as the Cheetah Lounge, on which premises is conducted a tavern business.

Third: That he has examined the records in the office of the City Clerk and has found that the following license has been issued by the City of Kenosha for said premises and that the same is in full force and effect for the 1971-72 license year:

To Sleepy's, Inc., a Wisconsin corporation, a Class "B" Retail Beer and Liquor license for the License period of 1971-1972 for the premises located at 5629 - 24th Avenue.

That Martin L. DeFoor, 5629 - 24th Avenue, Kenosha, Wisconsin, is a duly appointed agent for said corporation as required by Sections 66.054 (8) and 176.05 (13) Wis. Stats.

Fourth: That he has examined the Police Department records and compared them with the records of Kenosha County Court and has spoken with Officers under his command after which he filed the following complaint against the license holder and the licensed premises: That since July 2, 1971, there have been two convictions for lewd and lacivious
319 behavior on the licensed premises to wit: Carolyn Blevens and Karen Simonds, both convicted on

September 22, 1971. That since July 2, 1971, there have been two (2) arrests for lewd and obscene performances on the licensed premises.

That since July 2, 1971, there have been numerous arrests and some convictions for soliciting for prostitution in the immediate area of the licensed premises.

That since July 2, 1971, there have been numerous reports from Police Officers that women known to be prostitutes are frequently in or about the immediate area of the licensed premises.

That, based upon the files, records and information received at the Kenosha Police Department, he is requesting revocation proceedings be commenced under Section 176.11, Wisconsin Statutes.

That this Affidavit is made for the purpose of making a complaint in writing and under oath, pursuant to Section 176.11, Wis. Stats., against Sleepy's, Inc., a holder of a Class "B" Retail Beer and Liquor License on the asserted grounds that said licensee has violated the conditions for such license issued by the City of Kenosha, Wisconsin.

/s/ Joseph H. Trotta
JOSEPH H. TROTTA

Subscribed and sworn to before me
this *14th* day of March, 1972.

/s/ Michael S. Fisher
Michael S. Fisher, Notary Public,
Kenosha County, Wisconsin.

My Commission is Permanent.

320 NOW COMES Burton A. Scott and alleges and shows to the Court as follows:

1. That affiant is the duly elected and qualified and acting District Attorney in and for Kenosha County, Wisconsin.

2. That there are now pending in Kenosha County two criminal cases alleging violations of Section 944.21 (1) (d), of the Wisconsin Statutes, and arising out of performances by female entertainers on the Class "B" licensed premises known as "Cheetah Lounge", to wit:

State of Wisconsin v. Brenda F. Fillipi, a true and correct copy of criminal complaint which is the basis for said action being attached hereto and incorporated herein by reference. Said defendant is scheduled for jury trial on April 11, 1972; and

State of Wisconsin v. Valerie Kitover, a true and correct copy of criminal complaint which is the basis for said action being attached hereto and incorporated herein by reference. Said defendant has waived preliminary hearing and has been bound over to Circuit Court in Kenosha County for trial.

3. That there is presently pending against Martin DeFoor, the agent for the corporation which holds the license for the "Cheetah Lounge", a criminal action alleging a violation of Section 944.21 (1) (d), a true and correct copy of the complaint upon which said criminal action is based is attached hereto and incorporated herein by reference.

4. That this affidavit is made in support of the City of Kenosha motion to modify the restraining order in the above

321 entitled action in order to allow the City of Kenosha to hold a revocation hearing in regard to the continued operation of the "Cheetah Lounge" as a licensed premises.

/s/ Burton A. Scott
Burton A. Scott,
District Attorney in and for
Kenosha County, Wisconsin

Subscribed and sworn to before me
this *16th* day of March, A.D. 1972.

/s/ Robert V. Baker III
Notary Public, Kenosha County, Wisconsin
My commission is permanent.

322 STATE OF WISCONSIN,
COUNTY COURT (II) COURT
KENOSHA COUNTY

STATE OF WISCONSIN,
Plaintiff, CRIMINAL COMPLAINT

vs.

BRENDA F. FILIPPI File No. *9802*
935 Chicago Avenue
Hammond, Indiana,
Address

Defendant.

Robert Loewen, being first duly sworn on oath says that on October 27, 1971, at the City of Kenosha, in said County, the defendant did: intentionally and feloniously perform a lewd, obscene and indecent performance; in that at approximately 9:35 P.M. on said date the said defendant was observed

by City of Kenosha Police Officers Anthony Marabelli and Cyril Ellison dancing on a stage at the Cheetah Lounge, located at 5627 - 24th Avenue in said city; that during said dance said officers observed the defendant remove from her body all of her clothing; that they further observed said defendant removing pubic hairs from her vaginal area and passing the same to patrons in said Cheetah Lounge; that during said dance said defendant gyrated with her body in a manner fashioned after sexual intercourse; said conduct by the defendant being contrary to Section 944.21 (1) (d), Wis. Stats., and prays that said defendant be dealt with according to law; and that the basis for the complainant's charge of such offense is: that complainant is a City of Kenosha Police Officer and has knowledge of the above alleged facts from reading the reports of City of Kenosha Police Officers Cyril Ellison and Anthony Marabelli, eyewitnesses in which reports the above alleged facts are set forth; that complainant believes said Cyril Ellison and Anthony Marabelli to be reliable because they are eyewitnesses to the facts above alleged.

/s/ Robert Loewen
Complainant

Subscribed and sworn to before me on
November 2, 1971.

/s/ Mario J. Ventura, Jr.
Asst. District Attorney Judge Court Commissioner

Approved for filing */s/ Mario J. Ventura, Jr.*
Asst. District Attorney Judge Court Commissioner

I find that probable cause (exists) (does not exist) that the crime was committed by the defendant and order that he be (held to answer thereto) (released forthwith).

Dated November 2, 1971

/s/ John E. Malloy
Judge Court Commissioner

323

STATE OF WISCONSIN,
COUNTY COURT (II) COURT,
KENOSHA COUNTY

STATE OF WISCONSIN,
Plaintiff, CRIMINAL COMPLAINT

vs.

VALERIE A. KITOVER File No.
5917 N. Kenmore
Chicago, Illinois,
Address

Defendant.

William P. Schmitz, being first duly sworn on oath says that on February 24, 1972, at the City of Kenosha, in said County, the Defendant did: intentionally and feloniously perform a lewd, obscene and indecent performance; in that at approximately 9:45 P.M. on said date, said defendant was observed by City of Kenosha Police Officer William P. Schmitz dancing on a stage at the Cheetah Lounge, located at 5627 - 24th Avenue in said city; that during said dance, said police officer observed the defendant remove from her body all of her clothing; that said police officer further observed the defendant dancing completely nude and doing various suggestive squats and bends and exposing her vaginal area to the audience and that she then squatted near the front of the stage in front of a male patron and grabbed him by the head and made a motion as if to pull his face into her vagina; that said defendant then got up and laid a rug upon the floor of the stage and laid down on the rug on her back with her head away from the audience, and spread her legs into a wide open position and took a large plume and ran it up her leg beginning at the toes and stopping at her vaginal area where

she made a dusting and patting motion with the plume and then repeated the stroking of the leg and patting of the vaginal area several times; that said defendant then got up and placed the plume between her legs and while holding it with one hand in front of her body and one hand behind her body, she ran said plume forward and backward on her vaginal area and then proceeded to the front of the stage and rubbed the plume under the nose of a male customer; said conduct by the defendant being contrary to Section 944.21 (1) (d), Wis. Stats.; and prays that said defendant be dealt with according to law, and that the basis for the complainant's charge of such offense is that affiant is a City of Kenosha Police Officer and has knowledge of the above alleged facts by reason of being an eyewitness thereto.

/s/ William P. Schmitz
Complainant

Subscribed and sworn to before me on
March 8, 1972.

/s/ William U. Zievers
Court Commissioner

Approved for filing */s/ Burton A. Scott*
District Attorney

I find that probable cause (exists) (does not exist) that the crime was committed by the defendant and order that he be (held to answer thereto) (released forthwith).

Dated March 8, 1972

/s/ William U. Zievers
Court Commissioner

STATE OF WISCONSIN,
COUNTY COURT (II) COURT,
KENOSHA COUNTY

STATE OF WISCONSIN,
Plaintiff, CRIMINAL COMPLAINT

vs.

MARTIN DE FOOR
5629 - 24th Avenue
Kenosha, Wisconsin,
Address

File No. *9798*

Defendant.

Anthony Marabelli, being first duly sworn, on oath says that on October 27, 1971, at the City of Kenosha, in said County, the defendant did: intentionally and feloniously produce a lewd, obscene, and indecent performance; in that at approximately 9:35 P.M. on said date the said defendant was the agent and operator of a Class "B" licensed tavern located at 5627 - 24th Avenue in said city; that said defendant did knowingly suffer and permit one Brenda F. Filippi to dance as a go-go dancer on the stage of said lounge; that during the course of said dance, the said Brenda Filippi did publicly and indecently expose a sex organ, to wit, the region of her external vaginal orifice; that she did remove all the clothing from her body and did further remove pubic hairs from her vaginal area and pass them to patrons of said tavern; that she did, during said dance and while naked, dance in a manner fashioned after sexual intercourse, all of said acts being done with the knowledge, sufferance, approval, and ratification of said defendant; said conduct by the defendant being contrary to Section 944.21 (1) (d), Wis. Stats., and prays that said defendant be dealt with according to law; and that the basis for the

complainant's charge of such offense is: that complainant is a City of Kenosha Police Officer and has knowledge of the above alleged facts from reading the report of City of Kenosha Police Officer Cyril Ellison, eyewitness, in which report the above alleged facts are set forth, and by reason of being an eyewitness thereto, and from reading the records of the City Clerk of Kenosha which state that said defendant was the agent for said Cheetah Lounge; that complaint believes said Cyril Ellison to be reliable because he is an eyewitness to the facts above alleged.

/s/ Anthony Marabelli
Complainant

Subscribed and sworn to before me
on December 14, 1971

/s/ Bruce E. Schroeder
Asst. District Attorney

Approved for filing */s/ Bruce E. Schroeder*
Asst. District Attorney

I find that probable cause (exists) (does not exist) that the crime was committed by the defendant and order that he be (held to answer thereto) (released forthwith).

Dated December 14, 1971

/s/ Earl D. Morton
Judge

CERTIFICATE OF SERVICE

I, the undersigned, a member of the Bar of this Court, do hereby certify that on February 26, 1973, I duly mailed three copies of the Appendix to each of the attorneys for the appellees, addressed as follows:

Mr. Jay Schwartz
704 Park Avenue
Racine, Wisconsin 53403

Mr. Victor C. Cairo
704 Park Avenue
Racine, Wisconsin 53403

LE ROY L. DALTON
Assistant Attorney General
of Wisconsin

Attorney for Appellants

Supreme Court of the United States

No. 72-658

City of Kenosha, Wisconsin, et al.,

Appellants,

v.

Peter G. Bruno, et al.

APPEAL FROM the United States District Court for the Eastern District of Wisconsin.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

January 8, 1973

72-658 FILE COPY

Supreme Court, U.S.
OCT 28 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-658

CITY OF KENOSHA,
A Wisconsin Municipal Corporation;
CITY OF RACINE,
A Wisconsin Municipal Corporation;
ROBERT W. WARREN, Attorney General
of the State of Wisconsin,
Intervening Defendant,
Appellants,

v.

PETER G. BRUNO;	No. 71-C-330
BRUCE BLEASHKA;	No. 71-C-331
SLEEPY'S, INC.;	No. 71-C-332
FRED KAUZRICH;	No. 71-C-333
JEANETTE STENZEL;	No. 71-C-334
CHARLES WIGINTON;	No. 71-C-352
RICHARD A. MISURELLI and	No. 71-C-316
TERRANCE MC CUE;	
GO-GO OF RACINE, INC.,	No. 71-C-317
A Wisconsin Corporation,	
THEODORE F. WITHERIL, and	
JEROME J. RUETZ, JR.; and	
DAVID H. ROBERS,	No. 71-C-335

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

ROBERT W. WARREN
Attorney General of Wisconsin

LE ROY L. DALTON
Assistant Attorney General

EDWARD A. KRENZKE
Deputy City Attorney of Racine, Wisconsin

MICHAEL S. FISHER
City Attorney of Kenosha, Wisconsin

Attorneys for Appellants

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

October 27, 1972

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No.

CITY OF KENOSHA,
A Wisconsin Municipal Corporation;
CITY OF RACINE,
A Wisconsin Municipal Corporation;
ROBERT W. WARREN, Attorney General
of the State of Wisconsin,
Intervening Defendant,
Appellants,

v.

PETER G. BRUNO;	No. 71-C-330
BRUCE BLEASHKA;	No. 71-C-331
SLEEPY'S, INC.;	No. 71-C-332
FRED KAUZRICH;	No. 71-C-333
JEANETTE STENZEL;	No. 71-C-334
CHARLES WIGINTON;	No. 71-C-352
RICHARD A. MISURELLI and TERRANCE MC CUE;	No. 71-C-316
GO-GO OF RACINE, INC., A Wisconsin Corporation, THEODORE F. WITHERIL, and JEROME J. RUETZ, JR.; and	No. 71-C-317
DAVID H. ROBERS,	No. 71-C-335

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions and temporary restraining orders of the Honorable John W. Reynolds, Judge of the United States District Court for the Eastern District of Wisconsin, entered on October 21, 1971, are at this time unreported and are included in the appendix herein, in cases numbered 71-C-330, 71-C-331, 71-C-332, and 71-C-333 at App. 102-110; in case 71-C-352 at App. 110-111; in case 71-C-334 at App. 111-112; in case 71-C-316 at App. 112-113; in cases 71-C-317 and 71-C-355 at App. 114-117.

The decisions and orders of the three-judge court made up of the Honorable Thomas E. Fairchild, Circuit Judge, and the Honorable John W. Reynolds and the Honorable Myron L. Gordon, Judges of the United States District Court for the Eastern District of Wisconsin, entered on August 2, 1972, are at this time unreported and are included in the appendix herein, in cases 71-C-316, 71-C-317, and 71-C-335 at App. 117-128; and in cases 71-C-330, 71-C-331, 71-C-332, 71-C-333, 71-C-334, and 71-C-352 at App. 129-130.

JURISDICTION

This is a single jurisdictional statement involving nine cases covering the captioned appellees which involve identical or closely related questions, as authorized by Supreme Court Rule 15 (3).

These are actions for declaratory and injunctive relief under the Civil Rights Act, 42 U.S.C. §1983. Jurisdiction is said to be involved under Title 28 U.S.C. §1343 (3). The three-judge court indicates in its decision that if civil rights jurisdiction were not proper each plaintiff could assert the necessary $10,000 controversy requirement of 28 U.S.C. §1331. It is alleged that secs. 176.05 (1) and 176.05 (8) of the Wisconsin Statutes violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The statutory provision conferring jurisdiction on this court to review the judgment by direct appeal is 28 U.S.C. §1253.

Cases sustaining the jurisdiction of the court to hear the appeal are *Goldstein v. Cox* (1970), 396 U.S. 471, 90 S.Ct. 671, 24 L.Ed. 2d 663, and *Wyman v. Rothstein* (1970), 398 U.S. 275, 90 S.Ct. 1582, 26 L.Ed. 2d 218.

WISCONSIN STATUTES INVOLVED

Section 66.054 (5):

"(b) The governing body of every city, village and town shall have the power, but shall not be required, to issue licenses to wholesalers and retailers for the sale of fermented malt beverages within its respective limits, as herein provided. Said retailers' licenses shall be of 2 classes, to be designated as Classes 'A' and 'B.' "

Section 176.05 (1), (5), (8):

"176.05 Liquor licenses. (1) AUTHORITY TO GRANT LICENSES. Each town board, village board and common council may grant retail licenses, under the conditions and restrictions in this chapter contained, to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors. No member of any such town board, village board or common council shall sell directly or indirectly or offer for sale, to any person, firm, or corporation that holds or applies for any such license any bond, material, product, or other matter or thing that may be used by any such licensee or prosepctive licensee in the carrying on of his or its said business.

"* * *

"(5) * * * Except as provided in sub. (6), all such licenses shall remain in force until July 1 next after the granting thereof, unless sooner revoked; * * *.

"* * *

"(8) ANNUAL LICENSE MEETINGS. All town and village boards and common councils, or the duly authorized committees of such councils, shall meet not later than May 15 of each year and be in session from day to day thereafter, so long as it may be necessary, for the purpose of acting upon such applications for license as may be presented to them on or before April 15, and all applications

for license so filed shall be granted, issued or denied not later than June 15 for the ensuing license year, provided that nothing shall prevent any governing body from granting any licenses which are applied for at any other time. As soon as an application has been approved, a duplicate copy thereof shall be forwarded to the secretary of revenue. No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection."

QUESTIONS PRESENTED

1. Whether liquor and fermented malt beverage licenses which expire at the end of a licensing year constitute "liberty" or "property" within the meaning of the due process clause of the Fourteenth Amendment.

Answered by the three-judge court in the affirmative.

2. If a protected interest can be identified, is a legislative-type hearing coupled with availability of subsequent court review by certiorari a *meaningful* hearing under the due process clause?

Answered by the three-judge court in the negative.

3. Whether the abstention doctrine should apply to a three-judge court action where the prayer for relief includes the court-ordered issuing of a liquor license and the state remedies have not been exhausted?

Answered by the three-judge court in the negative.

STATEMENT OF THE CASE

Appellees were applicants for renewal of their Class "B" fermented malt beverage and intoxicating liquor licenses which were expiring on July 1, 1971, except Richard A. Misurelli who was applying for the license for the first time, apparently in place of a silent partner, Terrance McCue.

Wisconsin has local option for both fermented malt beverage licensing and liquor licensing under secs. 66.054 (5) (b) and 176.05 (1), Wis. Stats., respectively. If an application is denied the applicant must seek review in court by writ of certiorari. Section 176.05 (8) provides that where an application for renewal is rejected the clerk's minutes must show the reasons for such rejection. However, no judicial-type hearing is required. Municipalities hold legislative-type hearings before issuing or denying licenses. All licenses remain in force until July 1 next after the granting thereof unless sooner revoked as provided in sec. 176.05 (5), Wis. Stats.

During the licensing year from July 1, 1970, to July 1, 1971, appellees provided entertainment in their taverns consisting of nude and seminude dancing and violated municipal ordinances requiring costumes for dancers in cabarets, but the cities were enjoined from enforcement by federal court orders.

On June 1, 1971, after holding public hearings, the City Council of Racine, acting on the recommendation of its License and Welfare Committee, refused to renew the licenses of Go-Go of Racine, Inc., and David H. Robers because, among other things, the committee concluded that because of the manner of operation of their business, using nude entertainment, that the reputation of the City of Racine was

changing to that of a city of "ill repute." It was also concluded that an undesirable element was being attracted to the community which fostered an increase in prostitution, promiscuity, and venereal disease. (App. 115).

On the same date the City of Racine refused to issue an initial license to Richard A. Misurelli, apparently a silent partner of Terrance McCue who had held the 1970-1971 license but did not apply for renewal, for the same reasons that Go-Go of Racine, Inc., and David H. Robers were denied renewals.

On June 7, 1971, after holding public hearings, the City of Kenosha denied the renewals of Peter G. Bruno, Bruce Bleashka, Sleepy's, Inc., Fred Kauzrich, and Charles Wiginton because, among other things, the appellees had defiled the reputation of the City of Kenosha, areawise, statewise, and nationally, by using nude dancers, and because they had helped furnish an atmosphere conducive to the flourishing of prostitution, creating a bad environment, and setting improper moral standards for the children in the community. (App. 104).

Appellee Jeanette Stenzel was granted renewal of her license on June 7, 1971. However, on June 21, 1971, the City Council of Kenosha voted to reconsider Stenzel's license, and upon reconsideration voted to deny her a license.

On June 30, 1971, the Honorable John W. Reynolds issued a temporary restraining order which ordered the City of Kenosha to issue retail fermented malt beverage and intoxicating liquor licenses to Bruno, Bleashka, Sleepy's, Inc., and Fred Kauzrich. Subsequently, Judge Reynolds ordered licenses be issued to the other appellees, including Richard A. Misurelli, who had not held a liquor license for the year 1970-1971. (App. 112-113).

After the filing of amended complaints on September 21, 1971, which specifically attacked the constitutionality of secs. 176.05 (1) and (8), Wis. Stats., under the due process clause of the Fourteenth Amendment because the statutes permit denial of license without judicial-type hearing, Judge Reynolds issued memorandum opinions and orders in each of the cases directing that the temporary restraining orders then outstanding in each of the cases would be continued until further order of the court. (App. 102-110).

After the convening of a three-judge court, the Governor and the Attorney General of Wisconsin were notified of the pendency of the actions and the Attorney General intervened as a defendant. The parties stipulated to the facts and each moved for summary judgment. In ruling on the motion, the three-judge court found that Racine, acting upon the appellees' applications for renewal of their liquor licenses, except Misurelli who was a first-time applicant, held a public hearing before the City Council Licensing Committee in which all citizens of the community were allowed to make statements for and against the nude dancing activities in the taverns operated or proposed to be operated by the appellees. Citizens expressing their views were not placed under oath and they were not cross-examined. No verbatim transcript was made and none was requested by the appellees. The appellees appeared at the hearing and made statements. Notes were taken by the Committee and a written report was filed with the City Council recommending that licenses not be issued to Go-Go of Racine, Inc., Richard A. Misurelli, and David H. Robers. (App. 114-116). Substantially the same procedure was followed by the City of Kenosha in denying licenses to the other appellees. (App. 104-105).

The temporary restraining orders were entered by Judge Reynolds on October 21, 1971, on the basis that plaintiffs enjoy a reasonably good chance to prevail on the constitutional questions and that irreparable injury would result otherwise. The orders protected the licenses of the appellees through the 1971-1972 licensing year and that part of the 1972-1973 licensing year from July 1, 1972, to the August 2 decision and order of the three-judge court directing the appellant cities to grant Class "B" fermented malt beverage and intoxicating liquor licenses.

THE QUESTIONS ARE SUBSTANTIAL

I. The Decision Below Is Inconsistent With Rulings Of This Court.

A. The court below erred in determining a liquor license is a property right.

"There is no right to engage in the business of manufacturing, selling or otherwise dealing in intoxicating liquor in the sense that there is a right to engage in occupations and pursuits intrinsically desirable or innocuous. It is widely if not universally recognized that intoxicating liquor businesses of all kinds are potentially if not actually dangerous or harmful to the public health, morality and welfare, and that consequently they are subject to strict supervision or prohibition by states and also by municipalities authorized to act in the matter. * * *" 9 McQuillin, *Municipal Corporations*, 483, §26.186.

This court has recognized since *Crowley v. Christensen* (1890), 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620, that refusal to issue or renew a liquor license does not deny a property right. The court noted, 137 U.S. 91:

"* * * The police power of the State is fully competent to regulate the business — to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. * * * It is a matter of legislative will only. * * *"

See also *Ma-King Products Co. v. Blair* (1926), 271 U.S. 479, 46 S.Ct. 544, 70 L.Ed. 1046.

In *Lewis v. City of Grand Rapids* (6th Cir. 1966), 356 F. 2d 276, the court said: "The only inescapable rule of *Crowley* is that the denial of a hearing, in itself, would not violate the Fourteenth Amendment."

Since the Twenty-first Amendment this court has consistently held that the states possess "* * * broad regulatory power over the liquor traffic within their territories." *United States v. Frankfort Distilleries* (1944), 324 U.S. 293, 299, 65 S.Ct. 661, 664, 89 L.Ed. 951. *Joseph E. Seagram & Sons v. Hostetter* (1966), 384 U.S. 35, 42, 86 S.Ct. 1254, 16 L.Ed. 2d 336.

In *Goesaert v. Cleary* (1948), 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163, Justice Frankfurter placed in proper perspective the relative interest of the state in establishing a legislative scheme for governing and controlling liquor traffic and the rights expressed under the Fourteenth Amendment:

"* * * The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and untrammeled of legislative powers [of the state]. * * * The [Federal] Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."

See also *Giozza v. Tiernan* (1893), 148 U.S. 657, 13 S.Ct. 721, 37 L.Ed. 599.

Here the "property" right question is similar to the question presented in *Board of Regents of State Colleges v. Roth* (1972), 405 U.S. —, 92 S.Ct. 2701, 32 L.Ed. 2d —. There the assistant professor was hired for a fixed term of one year and such employment accorded him no "property" interest protected by procedural due process. The court below cited the Court of Appeals decision in *Roth* (7th Cir. 1971), 446 F. 2d 806, which, of course, was reversed by this court.

There is no indication that the lower court considered whether there was any deprivation of liberty in the denial of the licenses involved in this appeal.

B. Legislative-type hearing with court review by certiorari is "meaningful" under the due process clause.

This court has repeatedly recognized that whether or not due process has been provided depends to a great extent upon the nature of the proceeding. Thus, in *Hannah v. Larche* (1960), 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed. 2d 1307, at 80 S.Ct. 1515, the court said:

> "* * * Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. * * *"

A legislative-type hearing where an applicant may present whatever evidence he feels necessary to convince a licensing body to renew his license gives the applicant and the public a chance to be heard on the issues and the court can protect the applicant from arbitrary and capricious refusals by review by writ of certiorari. *State ex rel. Ruffalo v. Common Council* (1968), 38 Wis. 2d 518, 157 N.W. 2d 568.

The statutes being attacked in this action as in violation of the due process clause of the United States Constitution do not require a judicial-type hearing, but they do not prohibit such type of hearing if a court thought it advisable to remand a case upon review by certiorari where factual issues were not determined when the licensing body reached its decision. The court could also, of course, determine whether errors of law were committed by the licensing board, including due process questions under state and federal constitutions. *State ex rel. Wasilewski v. Bd. School Directors* (1961), 14 Wis. 2d 243, 111 N.W. 2d 198.

In the instant cases, however, the record is clear that there are no factual issues involved. Both cities made it plain that they did not grant the applicants their licenses because of nude dancing in their establishments.

Therefore, not only are the Wisconsin statutes complained of not invalid on their face, but the lower court also erred in concluding that the appellees' due process rights were abridged by not being afforded a judicial-type hearing since there were no facts at issue in these cases.

Thus, the legislative-type hearing with court review by certiorari is not only *meaningful* within *Armstrong v.*

Manzo (1965), 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62, but also "appropriate to the nature of the case" within the meaning of *Mullane v. Central Hanover Bank & Trust Co.* (1949), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865.

Chapter 42 of the Laws of 1941 amended sec. 176.05 (8) of the Wisconsin Statutes to require reasons for rejection of renewal of liquor licenses in the clerk's minutes as an aid to the reviewing court on certiorari in determining if the licensing body was arbitrary, capricious, or discriminatory. *State ex rel. Boroo v. Town Board* (1960), 10 Wis. 2d 153, 102 N.W. 2d 238.

II. There Is A Conflict Of Opinion Among The Circuits On The Question.

The principal case relied on by the three-judge court is *Hornsby v. Allen* (5th Cir. 1964), 326 F. 2d 605. The Wisconsin Supreme Court specifically rejected *Hornsby* in the *Ruffalo* decision. Hornsby brought suit under the Civil Rights Act after being denied a liquor dealer's license. The court said that the licensing power is an adjudicative process and therefore judicial in nature rather than legislative and, therefore, the due process and equal protection provisions of the Fourteenth Amendment apply in the liquor licensing field. The court did not address itself to the question of whether a liquor license is liberty or property within the meaning of the due process clause. Therefore, insofar as the court below relied entirely upon due process requirements, the *Hornsby* case is not persuasive.

Two years after *Hornsby* the due process issue was squarely considered by the Sixth Circuit in *Lewis v. City of Grand Rapids* (6th Cir. 1966), 356 F. 2d 276. Getting directly

to the heart of the matter, at page 286, the court quoted the district judge as follows:

> "We recognize that the Michigan Supreme Court and the courts of the other states have held consistently that the due process clause of the United States Constitution does not apply to matters concerning liquor licenses." 222 F. Supp. 384.

On the question of whether a license is property, the court referred to *Scott v. Arcada Township Board* (1934), 268 Mich. 170, 255 N.W. 752, which emphasized the difference between the granting of a license and its revocation, indicating that revocation might indeed require due process. The court pointed out, however, at page 285:

> "* * * Plaintiff Lewis did not own a license to operate a liquor establishment, and the opportunity to seek approval to become an owner was not, in our view, a property right.* * *"

The three-judge court herein, and also the district judge in the *Lewis* case, apparently relied on the decision in *Glicker v. Michigan Liquor Control Commission* (6th Cir. 1947), 160 F. 2d 96, as holding that the licensing board was required to hold a full-dress adversary hearing before denying approval of a liquor license. However, the *Lewis* court specifically denied such holding in *Glicker* and declined to so hold, page 288. The *Glicker* case held merely that the state under a guise of regulating the liquor business could not deny its citizens equal protection of the law.

The *Lewis* court said further, at page 289:

> "* * * We recognize some observations in the Hornsby case as being at odds with our conclusion and to that extent we decline to follow it."

In *Atlanta Bowling Center, Inc. v. Allen* (5th Cir. 1968), 389 F. 2d 713, the court sidestepped *Hornsby* and rejected contentions of violation of due process and equal protection where the aldermen and mayor had refused to approve a liquor license for a room at a bowling center, the reasons relating to the location, the nature of the family recreation center, the attraction of minors to an amusement park nearby, and past precedent that liquor licenses were not given to bowling alleys.

Commenting that *Hornsby* is "* * * a case mistakenly thought by too many to be a pledge that if local authorities would not, a Federal Court would, grant a liquor license * * *," p. 714, the court held that the ordinance governing issuance of liquor licenses and emphasizing public interest and welfare and relation of location to other activities, properties and uses gave sufficient notice to applicants that they would be judged on those factors when applying for a liquor license, even though such reasons given when denying application were not expressly articulated in the ordinance.

In the instant case, Chapter 21 of the Racine ordinances relating to health, safety and welfare of the public and Chapter X of the Kenosha ordinances provide adequate notice that such factors would be considered in acting on applications for liquor licenses in those cities.

The lower court's almost complete reliance on *Hornsby*, the *Lewis* court's refusal to honor *Hornsby* on the due process issue, and the *Atlanta Bowling Center* court's treatment of *Hornsby* seem to clearly establish issues worthy of plenary consideration by this court.

III. The Court Below Should Have Abstained.

The Three-judge Court Act was not designed to be a grant of power to federal judges to arbitrarily interfere with a state regulatory scheme. Rather, the history of the Act clearly establishes that it was passed as a compromise to limit the power of lower federal court judges to interfere with the operation of state statutes. It has been said that it's purpose was to prevent the "improvident statewide doom" by a federal court of a state legislative policy.

As Justice Frankfurter said in *Phillips v. United States* (1941), 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800, at 61 S.Ct. 483:

> "* * * The history of §266 * * * the narrowness of its original scope, the piece-meal explicit amendments which were made to it * * *, the close construction given the section in obedience to Congressional policy * * *, combine to reveal §266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."

As Judge Reynolds has indicated in his opinion of October 21, 1971 (App. 106), the temporary restraining order directing the issuance of liquor licenses on June 30, 1971, was issued despite the fact that the plaintiffs had not requested in their pleadings the convening of a three-judge district court or the entering of an interlocutory injunction. Judge Reynolds requested the three-judge court on his own motion several weeks after he had issued the temporary restraining order directing the municipalities to issue liquor licenses.

It is submitted that this court should determine whether the action of the single federal district judge violated 28 U.S.C. §2281 and 28 U.S.C. §2284, and whether the abstention principles stated in *Burford v. Sun Oil Co.* (1943), 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424, and *Alabama Public Service Commission v. Southern Railway Company* (1950), 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002, which indicate that the court should abstain when its action would interfere with policies having statewide significance and importance, should not have been applied by the district judge.

The abstention principle is especially applicable to the appellee Go-Go of Racine, Inc., because a civil action was pending in the circuit court of Racine County at the time of Judge Reynolds' original exercise of jurisdiction. Mr. Justice White in his dissenting opinion in *Lynch v. Household Finance Corp.* (1972), 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed. 2d 424, indicated that *Younger* and companion cases support the view that the federal court's equitable powers should not be used to frustrate or interfere with the operation of state courts by adjudicating federal questions which can be adjudicated in state courts and this principle is applicable where state civil litigation is in progress.

IV. The Effect Of The Decision Below Is Undesirable.

The three retail liquor establishments in the City of Racine, Wisconsin, which are the subjects of this appeal, are presently operating under a license created by the judgment of the United States District Court for the Eastern District of Wisconsin. They are free to have nude dancing in these establishments licensed by the federal court. The license

which hangs on the wall takes the form of a blank application form of the City of Racine with the federal court order attached thereto. In Kenosha, six retail liquor establishments operate under the protective court order against the will of the licensing body of that city.

The improvident nature of the judgment is further illustrated by the terms which enjoin both citites "* * * from denying any application for the renewal of a liquor license as long as §§ 176.05 (1) and 176.05 (8) of the Wisconsin Statutes fail to require a hearing meeting the standards of due process set forth in this opinion." (App. 124, 130).

Apparently the citites cannot deny any application for the renewal of any other liquor license as long as the Wisconsin Statutes remain unchanged.

The court below has ruled directly contrary to the Supreme Court of Wisconsin, which held in *State ex rel. Ruffalo v. Common Council, supra,* that the granting of a liquor license is a legislative function which does not require a trial-type hearing to comport with due process.

If the lower court decision stands, not only Wisconsin but all other states which have local option laws will be required to change the method of granting or denying liquor licenses where the legislative-type hearing is now employed. In Wisconsin and many other states, town boards, village boards, and city councils perform the liquor licensing function. In the scheme of things, the people of these states have decided that local licensing gives better protection against the evils of the liquor traffic. There are two obvious reasons, however, why local legislative bodies would be inappropriate to conduct judicial-type hearings for liquor license applicants. First,

obviously many small towns and villages would be ill-equipped to handle such a proceeding without hiring hearing examiners and attorneys to handle the proceeding. Second, in cities where a city attorney could guide the proceeding, the legislative body would be engaging in a "mixing of functions" which has been criticized by many courts as possibly denying due process rights where one person or body is the complainant, prosecutor, judge, and jury. See *Amos Treat & Co. v. Securities and Exchange Commission* (D.C. Cir. 1962), 306 F. 2d 260. The answer, of course, would be to change the licensing procedures by removing them from the local legislative body or providing for appeal to another tribunal.

Before the states are forced to change their liquor licensing procedures this court should hear full argument on the questions presented by this appeal.

The court in *Lewis v. City of Grand Rapids, supra,* recognized the importance of local control of liquor, 356 F. 2d at 286:

> "* * * The traditional municipal interests in regulating the liquor business, together with the problems of conducting this regulation through competent, civic-minded, part-time officials, require the use of flexible procedures. These exigencies of city management must not be disregarded by ordering that plaintiff Lewis, and everyone else wishing to become a transferee of a liquor license, receive a process including '* * * *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings.' * * *"

Accordingly, it is therefore respectfully submitted that probable jurisdiction should be noted.

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October 27, 1972

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OPINION AND TEMPORARY RESTRAINING ORDER, dated October 21, 1971, in cases 71-C-330, 71-C-331, 71-C-332, and 71-C-333 (formal parts omitted).

These cases involve plaintiff tavern operators who prior to July of this year held liquor licenses duly issued by the defendant City of Kenosha pursuant to Wis. Stats. Chapter 176. This past June the defendant refused to renew these licenses. Plaintiffs allege with regard to the defendant's refusal to renew that (1) the procedure used by the city council in passing on the license applications violated the due process mandates of the Fourteenth Amendment, and (2) the reason for defendant's denials in each case was solely the nude and semi-nude dancing entertainment provided by plaintiffs in their taverns and that denials for this reason constitute infringements of plaintiffs' First Amendment rights as incorporated in the Fourteenth Amendment. Causes of action are alleged under Title 42 U.S.C. §1983, and equitable relief ordering the issuance of liguor licenses is requested. Jurisdiction of this court is sought under Title 28 U.S.C. §§1331 and 1343.

On June 30, 1971, upon the verified complaints and affidavits of plaintiffs, briefs, and representations of counsel, and after a hearing in which all parties participated, I issued a temporary restraining order in each of these actions to the effect that the "City of Kenosha shall issue forthwith upon the tender of appropriate fees, a Class 'B' Retail Fermented Malt Beverage and Intoxicating Liquor License to * * * [plaintiffs' names] and to take all necessary steps to effectuate the same, until further order of the Court." Defendant subsequently brought on a motion to vacate the temporary restraining orders or, alternatively, to modify them. In addition, answers were filed and requests for admissions of fact and replies pursuant to Rule 36 of the Federal Rules of Civil Procedure and this court's order were exchanged by the parties.

On July 26, 1971, a hearing was held on defendant's motions, and on July 30, 1971, on the basis of that hearing, the record, and briefs of counsel, I denied the motions and indicated that I would apply for the convening of a three-judge district court. The purpose of this memorandum opinion is to explain my decision of July 30, 1971, and to continue the outstanding temporary restraining orders pursuant to Title 28 U.S.C. §2284(3).

As a result of Rule 36 requests and replies in the instant cases, virtually all relevant facts have been agreed to. They are as follows.

The plaintiffs in these actions are persons engaged in the operation of taverns featuring nude and semi-nude dancing in the City of Kenosha. Each of the plaintiffs between June 1970 and June 1971 held a Class "B" liquor license duly issued by the defendant City of Kenosha pursuant to Chapter 176 of the Wisconsin Statutes. Prior to June 1971, the plaintiffs filed with defendant's clerk appropriate and timely applications for the renewal of their Class "B" licenses for the license year 1971-1972. Public hearings were held by defendant, and for the purposes of those hearings, the plaintiff-applicants for licenses were segregated from the other 154 liquor license applicants because unlike the other 154 applicants, the plaintiffs featured nude entertainment in their bars. During the public hearings, the six plaintiffs were treated as a group rather than as individuals. At these hearings, residents of Kenosha were permitted to speak on the subject of plaintiffs' license renewals. Speakers, including attorneys representing plaintiffs, spoke both for and against issuance of licenses. No speaker was allowed to be cross-examined (although plaintiffs' attorneys never made such request) or was sworn under oath, and speakers were permitted to complain about what other unnamed persons had told them.

On June 7, 1971, the city council of defendant voted to deny plaintiffs' applications for license renewals because:

"1. The licensee, through his actions in general in operating his establishment has defiled the reputation of the City of Kenosha areawise, statewise and nationally.

"2. This person helped furnish an atmosphere conducive to the flourishing of prostitution, creating a bad environment and setting improper moral standards for the children in this community.

"3. Since the inception of the type of entertainment allowed by the licensee, the law enforcement problem has increased and the Police Department records indicate that parking and litter problems around the area and crimes of a violent nature escalated in areas of our city.

"4. The Chief of Police, head of the City's Police Department, recommends denial based on the fact that topless and bottomless entertainment as featured in the licensee's establishment is conducive to the lack of respect for law and authority as it relates to our community.

"5. Increased police surveillance of establishments of this type requires more man hours and thus proves costly to the taxpayers of the city.

"6. The type of entertainment conducted by the licensee promotes the 'wide open city' effect and is not attractive to new industry who may consider coming into the community.

"7. Entertainment, which has been allowed in this establishment, attracts an undersirable element from other cities who come to view the same."

and also because:

"The licensee has operated an establihsment which has harmed the reputation of the City; has helped furnish an atmosphere conducive to the flourishing of prostitution,

crime, parking and litter problems, additional law enforcement problems costly to the taxpayers, disrespect for law and authority, discouraging the attraction of new industry, attracting undesirables into the city and creating a bad environment and setting improper moral standards for the children in this community."

On June 21, 1971, the city council voted to reconsider the denial of licenses to the plaintiffs—

"On the basis of a signed agreement by five Class 'B' Tavern Licensees that there would be (1) No more topless, bottomless dancing (2) Female entertainers shall wear bottoms and tops when on licensed premises (3) No nude male entertainers (4) The injunction presently prending in Federal Court shall be dismissed upon enactment of a new cabaret ordinance * * *."

After a public hearing—

"The meeting was then turned over to Alderman Scoville, Council President, while Mayor Burkee took the floor, stating that should the licenses in question be restored, he would veto."

The city council then voted to again deny liquor licenses to the five plaintiffs, citing for their reasons the reasons given at the June 7 meeting.

The only specification or charges by the city council officially given to the plaintiffs were given at the meetings where the charges were brought up and discussed prior to any vote being taken. During this period of time the city had no enforceable obscenity standard with regard to nude dancing entertainment in conjunction with licensing to dispense liquor, and no finding of obscenity was ever made by any court or the city council with regard to the entertainment furnished by the plaintiffs.

Finally, it is stipulated that plaintiffs each have an investment in excess of $20,000 in their tavern operations, that the business of each plaintiff survives primarily by the

sale of liquor, and that the loss of a liquor license will cause a grave loss of revenue and patronage to each plaintiff's business, depriving the plaintiffs of the ability to participate in the tavern business.

Plaintiffs assert jurisdiction of this court under Title 28 U.S.C. §1343. I find that such jurisdiction is present pursuant to Title 42 U.S.C. §1983. The City of Kenosha is a proper party defendant in a §1983 cause of action seeking only equitable relief. *Schnell v. City of Chicago,* 407 F.2d 1084, 1086 (7th Cir. 1969); *Adams v. City of Park Ridge,* 293 F.2d 585, 587 (7th Cir. 1961).

I have concluded that although neither plaintiffs nor defendants have requested in their pleadings the convening of a three-judge district court, on my own motion an application for one should be made for the reasons hereinafter stated.

Plaintiffs plead for their causes of action that the City of Kenosha in denying renewal of their liquor licenses failed to provide adequate notice of the meetings or charges to be brought, failed to require sworn testimony or allow cross-examination, allowed hearsay testimony, and denied the licenses without perceptible standards—in sum, that they were given only a legislative type hearing as opposed to an administrative or quasi-judicial type hearing. Defendant admits for the most part the factual content of this allegation but argues that the licensing procedure is proper under Wis. Stats. §§176.05(1) and (5) as interpreted by the Wisconsin Supreme Court in *State ex rel. Ruffalo v. Common Council of the City of Kenosha,* 38 Wis.2d 518, 157 N.W.2d 568 (1968).

In *Ruffalo* the City of Kenosha denied renewal of a liquor license after holding a legislative type hearing because of the location of the tavern. The plaintiff in that action argued to the Wisconsin Court that the denial was arbitrary and without

due process in that both state statutory and federal constitutional law required a quasi-judicial type hearing with the same type of rights that plaintiffs in the instant actions request. The Wisconsin Supreme Court held that there was no such right under either §§ 176.05(1) and (5) or the Constitution. In doing so it specifically rejected *Hornsby v. Allen*, 326 F. 2d 605 (5th Cir. 1964), rehearing denied 330 F. 2d 55. In effect then plaintiffs are requesting equitable relief so as to prevent the defendant from enforcing Wis. Stats. §§ 176.05(1) and (5) as construed by the Wisconsin Supreme Court. Title 28 U.S.C. § 2281 dictates that if plaintiffs' contentions are correct, then the relief they seek may only be granted by a three-judge district court.

I next conclude that the contentions of the plaintiffs are not frivolous, that the constitutional issue presented is not insubstantial, and that should a three-judge court pass on the federal constitutional questions present in these cases, plaintiffs enjoy a reasonably good chance of ultimate success in their lawsuits. There is strong authority indicating that the states, while they have wide discretion in intoxicating beverage questions, are not free from the precepts of the Fourteenth Amendment. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), rehearing denied 330 F.2d 55; *Glicker v. Michigan Liquor Control Commission*, 160 F.2d 96 (6th Cir. 1947); *LaRue v. California*, 326 F.Supp. 348 (C.D. Calif. 1971); *Irvis v. Scott*, 318 F.Supp. 1246 (M.D. Pa. 1970); *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F.Supp. 593 (S.D. N.Y. 1970); *Midwest Beverage Co. v. Gates*, 61 F.Supp. 688 (N.D. Ind. 1945); *Reynolds v. Louisiana Board of Alcoholic Beverage Control*, 173 So.2d 57 (La. 1965). Likewise it is doubtful that liquor licensing can escape these requirements simply because licenses might be termed privileges. *Id.*, *Goldberg v. Kelly*, 397 U.S. 254 (1969); *Shapiro*

v. Thompson, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963). While the sixth circuit has held that in liquor licensing matters procedural rights such as plaintiffs claim are not owing under the Constitution, *Lewis v. City of Grand Rapids*, 356 F.2d 276 (6th Cir. 1966), the fifth circuit has come to the opposite conclusion, holding that such rights are required. *Hornsby v. Allen*, supra; *Barnes v. Merritt*, 428 F.2d 284 (5th Cir. 1970). Professor Davis in his Administrative Law Treatise has praised *Hornsby* and damned *Lewis*, 1970 Supplement, § 7.19, at 363-5. *Hornsby* has been cited favorably in *Goldberg v. Kelly*, supra, at 262 n. 9; *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968); and *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970). In *Goldberg* it was specifically noted that *Hornsby* dealt with the "right to obtain a retail liquor store license." With regard to plaintiffs' second cause of action, the three-judge court in *LaRue v. State of California*, supra, recently held that a state cannot per se forbid nude dancing in taverns in that (1) dancing is protected by the First Amendment, (2) nude dancing is not per se obscene, and (3) the interests of the state do not require such censorship. I further find that there is a reasonably good chance that should a three-judge court convene, it will not abstain from deciding these questions on the basis of *Younger v. Harris*, 401 U.S. 37 (1971), in that none of these actions involve criminal prosecutions and no state court is enjoined. Finally, defendant contends that even should plaintiffs' contentions be correct, the relief they seek—the issuance of a license—could not be granted by a federal court. *Berry v. Allen*, 411 F.2d 1142, 1146 (6th Cir. 1969). The equity power of a federal court to fashion relief in order to preserve the constitutional rights of the people of this country has been held to be wide ranging and to extend into

matters and actions often considered the private domain of local government. E.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Griffin v. School Board*, 377 U.S. 218, 232-234 (1964); *Jackson v. Oglive*, 426 F.2d 1333 (7th Cir. 1970); *Chambers v. Hendersonville City Board of Education*, 364 F.2d 189 (4th Cir. 1966); *State of Alabama v. United States*, 304 F.2d 583 (5th Cir. 1962), aff'd 371 U.S. 37; *Reynolds v. State Election Board*, 233 F.Supp. 323 (W.D. Okla. 1964); note also *State ex rel. Baroo v. Town Board*, 10 Wis. 2d 153, 160-161, 102 N.W. 2d 238 (1960). If the allegations of the plaintiffs' complaints are found to be correct by the three-judge court, I find that there is a reasonable probability that that court will fashion a suitable equitable relief.

Pursuant to Title 28 U.S.C. §2284(3), and for that purpose only, I find that on the basis of the record before me, including the affidavits and verified complaints of the plaintiffs, the representations of counsel, agreed statements of facts, and after hearings in this matter, irreparable damage will result if the outstanding temporary restraining order is not continued in each case. The plaintiffs are tavernkeepers, their livelihood and their investments are hinged upon their ability to sell liquor, and this ability in turn depends upon possessing a liquor license. Were I to fail to continue the outstanding temporary restraining orders, plaintiffs would be left without means to earn their living. Nor are these actions of such a nature that if the temporary restraining orders were not continued and plaintiffs were ultimately successful in the main action that they might then be able to calculate the damage done and sue for monetary relief. See *Minkoff v. Payne*, 210 F.2d 689 (D.C.Cir. 1963) where a temporary restraining order in a similar situation was approved.

Finally, defendant in the alternative has moved to modify the temporary restraining orders. In doing so it has offered no briefs, oral arguments, or reasons for such modification. Discretion dictates that unless sound reasons are advanced for such modification I insure the status quo until the three-judge court is convened.

IT IS THEREFORE ORDERED, pursuant to Title 28 U.S.C. §2284(3), that the temporary restraining orders presently outstanding in these actions be and they hereby are continued until further order of the court.

Dated at Milwaukee, Wisconsin, this *21st* day of October, 1971.

/s/ John W. Reynolds
U. S. District Judge

OPINION AND TEMPORARY RESTRAINING ORDER, dated October 21, 1971, in case 71-C-352 (formal parts omitted).

This is a companion case to *Bruno v. Kenosha*, C.A. No. 71-C-330, et al., decided earlier today. Procedurally and factually it is identical with those cases except that this action was commenced on July 8, 1971, and on that date this court entered an ex parte temporary restraining order.

For the reasons set out earlier today in my opinion in *Bruno v. Kenosha*, I conclude that I should request the convening of a three-judge court, and that pursuant to Title 28 U.S.C. §2284(3) the temporary restraining order presently outstanding should be continued.

On the basis of the record before me, including the affidavit and verified complaint of the plaintiff, representations of counsel, and a hearing in this matter, I find for purposes of Title 28 U.S.C. §2284(3) and for no other purpose that irreparable damage will result if the outstanding temporary restraining order is not continued.

IT IS THEREFORE ORDERED, pursuant to Title 28 U.S.C. §2284(3), that the temporary restraining order presently outstanding in this matter be and it hereby is continued until further order of the court.

Dated at Milwaukee, Wisconsin, this *21st* day of October, 1971.

/s/ John W. Reynolds
U. S. District Judge

OPINION AND TEMPORARY RESTRAINING ORDER, dated October 21, 1971, in case 71-C-334 (formal parts omitted).

This is a companion case to *Bruno v. Kenosha*, C. A. No. 71-C-330, et al., decided earlier today. Procedurally and factually it is identical with those cases except that at the June 7, 1971, meeting of the city council of Kenosha, the plaintiff was granted a license after she stated "that she no longer has or had for quite some time topless and bottomless entertainers, that she was interested in cooperating and would appreciate to be allowed to continue to be in business."

At the June 21, 1971, city council meeting, it was voted to reconsider plaintiff's license, and upon reconsideration it was voted to deny her a license.

On September 21, 1971, an amended complaint was filed in this action specifically alleging that the defendant acted pursuant to §176.05, Wis. Stats., and challenging that statute as unconstitutional. A three-judge district court is requested.

For the reasons set out earlier today in my opinion in *Bruno v. Kenosha,* I conclude that I should request the convening of a three-judge court, and that pursuant to Title 28 U.S.C. §2284(3) the temporary restraining order presently outstanding should be continued.

On the basis of the record before me, including the affidavit and verified complaint of the plaintiff, representations of counsel, and a hearing in this matter, I find for purposes of Title 28 U.S.C. §2284(3) and for no other purpose that irreparable damage will result if the outstanding temporary restraining order is not continued.

IT IS THEREFORE ORDERED, pursuant to Title 28 U.S.C. §2284(3), that the temporary restraining order presently outstanding in this matter be and it hereby is continued until further order of the court.

Dated at Milwaukee, Wisconsin, this *21st* day of October, 1971.

/s/ John W. Reynolds
U. S. District Judge

OPINION AND TEMPORARY RESTRAINING ORDER, dated October 21, 1971, in case 71-C-316 (formal parts omitted).

This is a companion case to *Bruno v. Kenosha,* C. A. No. 71-C-330, et al., decided earlier today. Procedurally it is identical with those cases. Factually, it is identical with *Robers v. Racine,* C. A.. No. 71-C-335, et al., decided earlier today except in the following aspects.

Reading all the pleadings and admissions of fact together, it appears that McCue and Misurelli are business partners in a tavern operation. In pursuance of their joint tavern operation, McCue was granted a liquor license for the year 1970-71. For reasons unknown, McCue did not apply for a liquor license for the year 1971-72, but rather his partner Misurelli so applied. Misurelli had not held a liquor license for the year 1970-71.

On September 21, 1971, an amended complaint was filed in this action alleging that the defendant acted pursuant to §176.05, Wis. Stats., challenging that statute as unconstitutional and requesting that a three-judge court be convened.

For the reasons set out earlier today in my opnion in *Bruno v. Kenosha,* I conclude that I should request the convening of a three-judge court. The fifth circuit does not appear to distinguish for due process purposes between new liquor license applications and renewals. See, e.g., *Barnes v. Merritt,* 428 F.2d 284 (5th Cir. 1970).

On the basis of the record before me, including the affidavit and verified complaint of the plaintiffs, representations of counsel, and a hearing in this matter, I find for purposes of Title 28 U.S.C. §2284(3) and for no other purpose that irreparable damage will result if the outstanding temporary restraining order is not continued.

IT IS THEREFORE ORDERED, pursuant to Title 28 U.S.C. §2284(3), that the temporary restraining order presently outstanding in this matter be and it hereby is continued until further order of the court.

Dated at Milwaukee, Wisconsin, this *21st* day of October, 1971.

/s/ John W. Reynolds
U. S. District Judge

OPINION AND TEMPORARY RESTRAINING ORDER, dated October 21, 1971, in cases 71-C-317 and 71-C-335 (formal parts omitted).

These are companion cases to *Bruno v. Kenosha,* C. A. No. 71-C-330, et al., decided earlier today. Procedurally they are identical with those cases. The parties using Rule 36 of the Federal Rules of Civil Procedure have agreed to the following facts.

The plaintiffs are the owners and operators of taverns in Racine, Wisconsin. In 1970 they were granted Class "B" Retail Fermented Malt Beverage and Intoxicating Liquor Licenses. During that licensing year they provided entertainment in their taverns consisting of nude and semi-nude dancing. In compliance with state law, plaintiffs filed with defendant appropriate and timely applications for renewal of their liquor licenses for the license year June 1971-June 1972. On June 1, 1971, the city council of Racine, after hearings and meetings were held by the License and Welfare Committee, voted to adopt the committee's report and thereby to deny plaintiffs' renewal of their liquor licenses. The adopted committee report as is pertinent to these cases reads as follows:

"Your LICENSE & WELFARE COMMITTEE to whom was referred:

"Respectfully report

"Item 21 (6) of May 18, 1971, being Item 11 D of May 4, 1971, being the following applications for Class B Retail Fermented Malt Beverage and Intoxicating Liquor License:

"Go-Go of Racine, Inc.	201 Main Street
Richard A. Missureli	1209 Douglas Avenue
Dave H. Robers	1814 - 16th Street

"Respectfully report and recommend that after two public hearings, and based upon testimony submitted at such hearings, each of the above applicants, by reason of their method and manner of operation of their business during the license year 1970-71, have contributed substantially to the creation of the following conditions within and/or concerning the City:

"a) A change of reputation of the City of Racine from that of a 'City of Advantages' to that of a city of ill repute.

"b) An atmosphere that now attracts into the community an undersirable element which has fostered an increase of prostitution, promiscuity and VD.

"c) A sensitivity on the part of the community to the indecent activity within the premises which now discourages residents from having relatives and friends visit the City.

"d) A sensitivity on the part of residents to indecency within the premises that has adversely effected [sic] family and home life of the community and which now causes concern on the part of parents for the moral well-being of their children.

"e) An atmoshphere of fear and concern on the part of citizens for the activity that goes on in these premises and which now causes them to refrain from entering business districts where these premises are located, and in turn causing loss of patronage to other merchants in the area.

"f) That there have been complaints of feuding between the management of two of the premises (Pussy Cat and Tubby's) and threats of violence between the two; also, there exists complaints against one of the premises (Tubby's) of having patrons physically ejected when the patron failed to spend sufficient money across the bar; as well as complaints of minors in two of the premises (Tubby's and Pussy Cat).

"That, therefore, in the best interest of the welfare and morals of the community, it is recommended that these license applications be denied.

* * * * *"

It is agreed that no finding of obscenity has ever been made of any performance rendered in plaintiffs' business operations.

Plaintiffs also allege in their requests for admission of facts that at the public hearings held with regard to license renewal, no speaker was sworn under oath or allowed to be cross-examined. Defendants in reply neither admit or deny and instead object on the ground of relevancy. Plaintiffs also allege that no notice of the hearing, etc., was given them, that discussion at both committee and council meetings with regard to plaintiffs' license applications centered upon defendants' desire to eliminate nude and semi-nude dancing, and that no enforceable obscenity standard with regard to dancing in taverns has ever been established by defendants. The defendants deny each of these allegations. Finally, the parties agree that plaintiffs' businesses survive primarily by the sale of liquor, that they cannot operate without a license, and that without a license there would be a total loss of revenue and patronage. The defendants deny, on the basis of insufficient knowledge, that plaintiffs have invested more than $20,000 in their tavern operations. Plaintiffs by way of verified complaints and affidavits have sworn to the truth of all the above allegations. (In the case of *Robers v. Racine,* a complete stipulation of facts has now been entered into between the parties. This stipulation is substantially in accord with the above.)

For the reasons set out earlier today in my opinion in *Bruno v. Kenosha,* C.A. No. 71-C-330, et al., I conclude

that I should request the convening of a three-judge court, and that pursuant to Title 28 U.S.C. §2284(3) the temporary restraining orders presently outstanding should be continued. (In the case of *Robers v. Racine,* an amended complaint was filed on September 21, 1971, alleging that the defendant acted pursuant to §176.05, Wis. Stats., and challenging that statute as unconstitutional. A three-judge court is requested.)

On the basis of the record before me, including affidavits and the verified complaints of the plaintiffs, representations of counsel, and after hearings in these matters, I find for purposes of Title 28 U.S.C. §2284(3) and for no other purpose that irreparable damage will result if the outstanding temporary restraining orders are not continued in each case.

IT IS THEREFORE ORDERED, pursuant to Title 28 U.S.C. §2284(3), that the teimporary restraining orders presently outstanding in these cases be and they hereby are continued until further order of the court.

Dated at Milwaukee, Wisconsin, this *21st* day of October, 1971.

/s/ John W. Reynolds
U. S. District Judge

DECISION AND ORDER, dated August 2, 1972, in cases 71-C-316, 71-C-317, and 71-C-335 (formal parts omitted).

Before FAIRCHILD, Circuit Judge, and REYNOLDS and GORDON, District Judges.

REYNOLDS, District Judge. In these §1983 actions, the plaintiff tavern owners challenge the defendant City of Racine's denial of their applications for renewal of their Class "B" Fermented Malt Beverage and Intoxicating Liquor Licenses on the ground that they were not given a fair hearing.

More specifically, they allege that the City of Racine ("Racine"), acting in accordance with state law, has violated their civil rights, both in the manner of and the basis for the denial of a renewal license in that the licenses were (1) denied without an adversary-type hearing, and (2) denied because of the nude dancing entertainment provided in the taverns. The complaint challenges Wis. Stats. §§176.05(1) and (8) as unconstitutional, and injunctive relief is requested. This court has jurisdiction pursuant to Title 28 U.S.C. §1343.[1]

In accordance with Title 28 U.S.C. §2281,[2] a three-judge court has been convened. The governor and attorney general of Wisconsin were notified of the pendency of these actions, and the attorney general intervened as a defendant. The parties have stipulated to the facts and each has moved for summary judgment. We find for the plaintiffs.

Sections 176.05(1)[3] and 176.05(8)[4] of the Wisconsin Statutes, as construed by the Wisconsin Supreme Court,[5] enable Wisconsin municipalities to deny liquor license applications after providing the applicant with only a legislative-type hearing "wherein one is given notice of the hearing and a fair opportunity to state his position * * *."[6] Specifically, this hearing need not necessarily include "the right to cross-examine or require testimony to be given under oath."[7]

Racine, acting upon the plaintiffs' applications for renewal[8] of their liquor licenses, held a public hearing before the city council licensing committee, in which all citizens were allowed to make statements. Citizens expressing their views were neither put under oath nor subject to cross-examination by the license applicants. A verbatim transcript of the hearing was not made. The plaintiffs appeared at the hearing and made statements.

Subsequent to these hearings, the license committee met and voted to recommend denial of plaintiffs' renewal license applications because of both the nude dancing entertainment provided by the applicants in their taverns and because of the negative effects this form of entertainment allegedly had on the community. The city council, upon receipt of their license committee's rerommendations and the reasons for those recommendations, voted to deny plaintiffs' applications for renewal of their Class "B" Fermented Malt Beverage and Intoxicating Liquor Licenses.

It is agreed that Racine's renewal licensing procedure is in accordance with Wis. Stats. §§176.05(1) and (8), and that unless plaintiffs possess the liquor license denied them, they will be unable to continue operation of their taverns, taverns in which they each have a substantial investment.

Reaching the merits of this controversy,[9] we find that when Racine failed to provide plaintiffs with (1) notice of the charges upon which denial of their liquor licenses was urged, (2) an opportunity to respond to those charges, (3) an opportunity to present witnesses under oath, (4) an opportunity to confront and cross-examine opposing witnesses under oath, and (5) the opportunity to have a verbatim transcript made at their own initiative and expense, it failed to provide plaintiffs with a hearing commensurate with Fourteenth Amendment due process. We further find that §§176.05(1) and (8) of the Wisconsin Statutes, as construed by the Wisconsin Supreme Court, are unconstitutional insofar as they expressly authorize a hearing not meeting minimal due process demands.[10]

The due process clause of the Fourteenth Amendment is one of subtle shading, embodying differing rules of fair play for differing types of proceedings.[11] In any given case the answer to whether the constitution requires a hearing or

a specific type of hearing depends not upon what labels might be attached to the matter in dispute[12] but rather depends upon a balancing of the citizen's stake in the matter vis-a-vis the Government's need for abbreviated decision making.[13] In the case at hand such a balancing, even when divorced from analogous precedent, leaves room for but one conclusion.

The stake of the plaintiffs is both their occupations and their investments for denial of the renewal of a liquor license bars them not only from selling liquor but substantially impairs the value of their taverns. They seek a hearing in which they are provided with a meaningful opportunity to disprove damaging charges and demonstrate that they are deserving of being licensed to continue in their chosen businesses.

There is no dispute that Racine's (and Wisconsin's) interest in being able to deny liquor licenses in general is substantial. However, its interest in being able to deny the renewal of licenses with no other safeguard than a legislative hearing is at best minimal. While defendants have chosen to remain largely silent on this issue, we can surmise but two arguable factors suggesting the foregoing of an adversary-type hearing—cost and inconvenience.[14] Both, however, are of questionable application. There would seem little reason, for instance, why increased expenses inherent in a more formal type hearing might not at least be partially recouped by taxing "costs" to the losing party, as is the practice in litigation before a court.[15] If a legislative hearing may be more convenient, certainly the adversary hearing of the type we hold as required today better serves the state and city's interest in ascertaining the truth. None of the rights set forth in our opinion today preclude the gathering of

information; rather the rights set forth act to better insure that Racine will have the entire picture before it when it acts.[16]

The Supreme Court has on several occasions held that a hearing in keeping with due process is required when the state denies an occupational license.[17] The fact that the cases before the Supreme Court might have touched areas of special local concern has not deterred this constitutional mandate.[18] We find two cases in particular, one affirmed and the other cited with approval by the Supreme Court, to be most compelling. In *Constantineau v. Grager*, 302 F.Supp. 861, 865 (E.D. Wis. 1969), this court held that before an individual might be denied the right to purchase liquor he was entitled "to an opportunity to confront the person claiming that his conduct warrants his being 'posted' and to present his side of the story before he is in fact 'posted.' " This holding was affirmed by the Supreme Court. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

In *Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964), the Fifth Circuit held that before a city may deny a license to sell liquor "the parties must generally be allowed an opportunity to know the claims of the opposing party, [citations omitted], to present evidence to support their contentions, [citations omitted], and to cross-examine witnesses for the other side, [citation omitted]." The Supreme Court cited *Hornsby*, specifically noting that it dealt with liquor licensing, in support of its holding that due process requires a hearing in public assistance cases. *Goldberg v. Kelly*, 397 U.S. 254, 262 n. 9 (1969).

We find in balancing the interests involved in the cases before us that the due process clause of the Fourteenth Amendment requires in the instant setting a hearing "granted at a meaningful time and in a meaningful manner."[19] We

further find that the legislative hearing permitted by state statute and granted by Racine fails to qualify as "meaningful" within the context of the cases before us.

First: When the reasons for the denial of a renewal of a license are based upon the testimony or reports of individuals,[20] the applicant must be given an opportunity[21] to present witnesses and confront and cross-examine his accusers. "Anonymous informations" are as repugnant to Americans today as they were to Roman emperors[22] and frontier lawmen.[23] The Supreme Court has increasingly "emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood."[24]

Second: Prior to a renewal license hearing, the applicant must be given timely notice of the reasons urged for denial. Given the wide ranging reasons that may constitute an adequate basis for denial of the renewal of a liquor license in Wisconsin as well as the fact that even if denial might be legally justified the licensing authority usually has the discretion to grant it if circumstances warrant such action, an applicant can present a meaningful defense only if he knows the basis upon which denial is urged. This notice must be timed so as to allow the applicant an adequate opportunity to investigate the charges, gather witnesses, and otherwise prepare a defense. Mere notice of a hearing date or notice of charges only an instant before the hearing fail to satisfy due process.

Third: Due process requires that the applicant for renewal of a liquor license have the opportunity to have the witnesses testify under oath and have a verbatim transcript of testimony made at his own initiative and expense. An applicant has a right to be safeguarded from license denial by deceit. Testimony under oath acts to insure truthful testimony, and a verbatim transcript acts to insure against arbitrary denials.

Defendants argue that state court remedies available under Wisconsin law subsequent to the denial of a liquor license provide the necessary constitutional safeguards. While the minimal procedural requirements of due process may be met in innumerable ways, present Wisconsin post-denial remedies do not suffice. It is, as the Fifth Circuit recently stated, "a hearing within the administrative framework to which" the license applicant is entitled. *Glover v. Housing Authority*, 444 F.2d 158, 162 (5th Cir. 1971). The requirement of a "meaningful" hearing is not met when one is faced "with the task of overcoming an adverse decree entered by one judge, based upon a finding * * * made by another judge." *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965). Under Wisconsin law a denial of a liquor license renewal may be reversed in only very limited situations, i.e., only when the municipality is found to have been arbitrary, capricious, or discriminatory.[25] Further, in a renewal situation there is no guarantee that review and relief will be had before the prior year's license lapses. *Bell v. Burson*, 402 U.S. 535, 542 (1971).

Denial of a liquor license renewal, as in the cases before us, involves a greater amount of potential damages than are at issue in most civil litigations and in many criminal actions. It is not unimportant to note that were not civil rights jurisdiction proper, each of the plaintiffs herein would be able to assert the necessary $10,000 controversy requirement of Title 28 U.S.C. §1331. In light of this substantial interest on the part of each of the plaintiffs and balanced against the needs of Racine and Wisconsin for an abbreviated hearing process, we find that due process demands the minimal procedural safeguards set forth above. Insofar as Wis. Stats. §§176.05(1) and (8) allow less, they are unconstitutional.[26] Reaching the conclusions we have with regard

to the procedure employed in the denial of a renewal license herein, it is unnecessary for us to consider the additional arguments presented by plaintiffs.[27]

IT IS THEREFORE ORDERED that plaintiffs' motions for summary judgment be and they hereby are granted, and that defendants' motions for summary judgment be and they hereby are denied.

IT IS FURTHER ORDERED that §§176.05(1) and 176.05(8) of the Wisconsin Statutes, insofar as they permit renewal of liquor licenses to be denied without permitting the applicants an opportunity for an adversary-type hearing in which the applicant is given timely notice of the reasons urged for denial and an opportunity to present, confront, and cross-examine witnesses under oath with a verbatim transcript, be and they hereby are declared unconstitutional.

IT IS FURTHER ORDERED that the defendant City of Racine is enjoined from denying any application for the renewal of a liquor license as long as §§ 176.05(1) and 176.05(8) of the Wisconsin Statutes fail to require a hearing meeting the standards of due process set forth in this opinion.

IT IS FURTHER ORDERED that until such time as plaintiffs' renewal liquor license applications are acted upon in a manner commensurate with the due process clause of the Fourteenth Amendment as set forth in the opinion above, the defendant City of Racine shall grant plaintiffs Class "B" Fermented Malt Beverage and Intoxicating Liquor Licenses.

Dated at Milwaukee, Wisconsin, this *2nd* day of *August*, 1972.

/s/ Thomas E. Fairchild
Thomas E. Fairchild, Judge,
U. S. Court of Appeals for the
Seventh Circuit

/s/ John W. Reynolds
John W. Reynolds, Chief Judge,
U. S. District Court, E. D. Wisconsin

/s/ Myron L. Gordon
Myron L. Gordon, Judge,
U. S. District Court, E. D. Wisconsin

FOOTNOTES

1. The City of Racine is a proper party defendant in light of the equitable nature of this action. *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969); *Adams v. City of Park Ridge*, 293 F.2d 585, (7th Cir. 1961).

2. "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute * * * shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges * * *."

For purposes of §2281, local officers are considered "state officers" when they enforce "a statute which 'embodies a policy of statewide concern.' " *Rorick v. Board of Commissioners*, 307 U.S. 208, 212 (1939); semble *Cleveland v. United States*, 323 U.S. 327, 332 (1945); *Turner v. Fouche*, 396 U.S. 346, 353 n. 10 (1970); *Board of Regents v. New Left Education Project*, 404 U.S. 541, 544 n. 2 (1972). Sections 176.05(1) and (8) of the Wisconsin Statutes, as construed by the Wisconsin Supreme Court in *State ex rel. Ruffalo v. Common Council*, 38 Wis. 2d 518 (1968), embody a policy of "statewide concern" in that they affirmatively permit all local governments throughout the state to deny a liquor license after only a legislative-type hearing. *Sailors v. Board of Education*, 387 U.S. 105, 107 (1967). This case then is unlike that decided in *Board of Regents v. New Left Education Project*, supra, wherein the challenged state campus regulation affected only a small percentage of the state-run colleges and universities. Nor can it be argued that since the challenged statutes set forth only minimum hearing requirements and thus allow local governments to provide additional hearing rights if they so desire, the statutes are simply ones of alternative "local options," none of which have general statewide effect. First, there is nothing before this court to suggest that there are any local governments in Wisconsin that provide other than a

legislative-type hearing. *Turner v. Fouche*, 396 U.S. 346, 353 n. 10 (1970). Second, regardless of what some local governments may do, the fact remains that it is the express policy of the challenged statutes, as construed by the Wisconsin Supreme Court, that they need grant no more than a legislative hearing. The "crux of the business [i.e., §2281] is procedural protection against an improvident state-wide doom by a federal court of a state's legislative *policy*." (Emphasis added.) *Phillips v. United States*, 312 U.S. 246, 251 (1941). When a district court may potentially cripple legislative policy by preventing certain applications or alternatives of a state statute, a three-judge court is required "even if the statute might be perfectly constitutional in some of its intended applications." *Boddie v. State of Connecticut*, 286 F.Supp. 968, 971 (D. Conn. 1968), rev'd on other grounds 401 U.S. 371 (1971); *Turner v. Fouche*, 396 U.S. 346, 353 n. 10 (1970). Finally it should also be noted that for purposes of §2281, the actions before us today, both in the nature of the challenge and in the pleadings, are virtually identical to *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), wherein the Supreme Court impliedly affirmed the convening of a three-judge court in this district by affirming on direct appeal the three-judge court's decision of law.

3. "AUTHORITY TO GRANT LICENSES. Each town board, village board and common council may grant retail licenses, under the conditions and restrictions in this chapter * * * to such persons entitled to a license under this chapter as they deem proper * * *."

4. "ANNUAL LICENSE MEETINGS. All town and village boards and common councils, or the duly authorized committees of such councils, shall meet not later than May 15 of each year * * * for the purpose of acting upon such applications for license as may be presented * * * [and shall act upon the applications] not later than June 15 * * *. * * * No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection."

5. *State ex rel. Ruffalo v. Common Council of the City of Kenosha*, 38 Wis. 2d 518 (1968).

6. Id. at 524.

7. Id. at 525.

8. In *Misurelli v. Racine*, C.A. No. 71-C-316 (E.D. Wis.), the expiring license was held by the partner of applicant. No explanation as to why the partnership decided to change the formal licenseholder is given. In substance, however, the application in *Misurelli* is undistinguishable from the applications in *Robers* and *Go-Go*. Each of the cases before us today involves a renewal situation. We express no opinion as to whether for due process purposes one may distinguish between renewal and initial license applications.

9. Defendants argue that plaintiffs have failed to exhaust their remedies and, alternatively, that we should abstain. The exhaustion argument was rejected in *King v. Smith*, 392 U.S. 309, 312 n. 12 (1968). As for abstention, these cases neither involve pending state criminal actions, *Younger v. Harris*, 401 U.S. 37 (1971), nor a complex issue of undetermined law, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Indeed, the Wisconsin Supreme Court has passed on the very issue before us. *State ex rel. Ruffalo v. Common Council of the City of Kenosha*, 38 Wis. 2d 518 (1968).

10. Even without the gloss of the state court's opinion, these statutes would be subject to attack.

"In the present case the Wisconsin Act does not contain any provision whatsoever for notice and hearing. There is no ambiguity in the state statute. * * * The Act on its fact gives the chief of police the power to do what he did to the appellee. Hence the naked question * * * is whether that Act on its face is unconstitutional. * * *" *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971).

11. *Hanah v. Larche*, 363 U.S. 420, 442 (1960).

12. *Goldberg v. Kelly*, 397 U.S. 254 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963); *United States v. Husband R. (Roach)*, 453 F.2d 1054, 1064 (5th Cir. 1971).

13. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1969); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1971).

It is too late in the day to argue that either the Twenty-first Amendment—

"The transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."—

or the alleged noxious character of liquor relieves states of all constitutional restraints with regard to liquor control. While cases may differ on the exact mandate of the Fourteenth Amendment, they are in agreement that that mandate attaches with regard to the state's regulation of liquor. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goesaer v. Cleary*, 335 U.S. 464 (1948); *Barnes v. Merritt*, 428 F.2d 284, 288 (5th Cir. 1970); *Glicker v. Michigan Liquor Control Commission*, 160 F.2d 96 (6th Cir. 1947); *LaRue v. California*, 326 F.Supp. 348 (C.D. Cal. 1971); *Midwest Beverage Co. v. Gates*, 61 F.Supp. 688 (N.D. Ind. 1945); *Schwegmann Bros. v. Louisiana Board*, 216 La. 148, 43 So.2d 248 (1949).

14. Two interests are clearly *not* involved. *First*, the state and city's interest in control of liquor is not at issue. All that is involved is the manner in which such control is exercised. *Second*, an interest in speedy adjudication in order to close down a tavern cannot be claimed. Under Wisconsin law one cannot operate a tavern until a license is granted. Indeed, in a "revocation" situation in which the need for emergency action might be claimed, Wisconsin law provides for a hearing with the type of rights plaintiff desires. Wis. Stats. §§176.11 and 176.12.

15. The particular license at issue herein would rarely, if ever, be applied for by an indigent.

16. *Stanley v. Illinois*, — U.S. — (April 3, 1972).

17. *Bratton v. Chandler*, 260 U.S. 110 (1922) (real estate); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 107 (1926) (accountant;); *Willner v. Committee on Character*, 373 U.S. 96 (1963) (attorney); cf. *Bell v. Burson*, 402 U.S. 535, 539 (1971) (driver's license) — "Once [drivers'] licenses are issued * * * their continued possession may become essential in the pursuit of a livelihood." Note also these recent lower court cases: *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967) (expulsion from Merchant Marine Academy); *Roth v. Board of Regents*, 446 F.2d 806 (7th Cir. 1971) (tenure); *Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir. 1971) (staff appointment in hospital).

18. *Londoner v. Denver*, 210 U.S. 373 (1908), (property tax); *Bragg v. Weaver*, 251 U.S. 57 (1919) (condemnation); *Armstrong v. Manzo*, 380 U.S. 545 (1965); and *Stanley v. Illinois*, — U.S. — (April 3, 1972) (child custody). Note also *Hahn v. Burke*, 430 F. 2d 100 (7th Cir. 1970) (probation); and *Bearden v. South Carolina*, 443 F. 2d 1090 (5th Cir. 1971) (parole).

19. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Bell v. Burson*, 402 U.S. 535, 541 (1971).

20. Thus a license denial based upon a criminal *conviction* would not demand cross-examination. This is not to day, however, that the applicant might not put on witnesses to show the mitigating circumstances.

21. *Richardson v. Perales*, 402 U.S. 389 (1971).

22. E.g., Trajan. *Carlson v. Landon*, 342 U.S. 524, 552 n. 7 (1952).

23. E.g., Wild Bill Hickok. *Jay v. Boyd*, 351 U.S. 345, 372 (1956).

24. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103 (1963); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

25. *State ex rel. Ruffalo v. Common Council of the City of Kenosha*, 38 Wis. 2d 518 (1968). Defendants argue that de novo review is available pursuant to Wis. Stats. § 66.054(14). However, even assuming it is in fact a true de novo proceeding, that proceeding offers review of only a Class "B" Fermented Malt Beverage License. Wis. Stats. §§ 66.054(14) and 66.054(1) (g). Review of the Class "B" Intoxicating Liquor License remains reviewable only in accordance with *Ruffalo*.

26. What we have said today should not be taken as a condemnation of legislative hearings. As a preliminary step in the licensing procedure, they may well be perfectly proper. In the instant cases, due process was not violated by holding a legislative hearing, but rather due process was violated by omitting an adversary-type hearing. What we hold then is that if legislative hearings are employed in the licensing procedure, then there must be interposed between the drawing up of the charges and the city council vote an opportunity for the applicant to respond as set forth in this opinion. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 105 (1963); *Ewing v. Mytinger and Casselberry*, 339 U.S. 594 (1950).

Nor should our opinion today be taken to suggest that whenever by way of legislation Racine makes a general policy decision applicable to everyone in general that licenseholders, even if they are adversely affected, may demand an adversary hearing to contest the legislation. That question is not before us. The cases we have addressed ourselves to involve the Racine City Council's deciding that individual tavern operators should be denied licenses because of their conduct.

27. These arguments are: first, that the First Amendment protects nude dancing in taverns. Compare *LaRue v. California*, 326 F. Supp. 348 (C.D. Cal. 1971), probable jurisdiction noted 40 L.W. 3287 *with Paladino v. City of Omaha*, 335 F. Supp. 895 (Neb. 1972), and *Hodges v. Fitle*, 332 F. Supp. 504 (Neb. 1971). The second argument is that there was insufficient prior warning or legislative standards that nude dancing would be grounds for license denial. See *Barnes v. Merritt*, 428 F. 2d 284 (5th Cir. 1970).

DECISION AND ORDER, dated August 2, 1972, in cases 71-C-330, 71-C-331, 71-C-332, 71-C-333, 71-C-334, and 71-C-352 (formal parts omitted).

Before FAIRCHILD, Circuit Judge, and REYNOLDS and GORDON, District Judges.

REYNOLDS, District Judge. These are companion cases to *Misurelli v. City of Racine, Go-Go of Racine, Inc. v. City of Racine,* and *Robers v. City of Racine,* Civil Action Nos. 71-C-316, 71-C-317, and 71-C-335, respectively, decided earlier today.

Jurisdiction of this court is in Title 28 U.S.C. § 1343, and a three-judge court has been convened pursuant to Title 28 U.S.C. § 2281. The parties have stipulated to the facts and each has moved for summary judgment. In essentials the licensing procedure followed by the City of Kenosha in accordance with Wis. Stats. §§ 176.05(1) and (8) was substantially similar to that followed by Racine as set out in the companion cases above referred to. For the reasons set forth in the companion cases, summary judgment is granted in favor of the plaintiffs in each of the above-captioned actions.

IT IS THEREFORE ORDERED that plaintiffs' motions for summary judgment be and they hereby are granted, and that defendant's motions for summary judgment be and they hereby are denied.

IT IS FURTHER ORDERED that §§ 176.05(1) and 176.05(8) of the Wisconsin Statutes, insofar as they permit renewal of liquor licenses to be denied without permitting the applicants an opportunity for an adversary-type hearing in which the applicant is given timely notice of the reasons urged for denial and an opportunity to present, confront, and cross-examine witnesses under oath with a verbatim transcript, be and they hereby are declared unconstitutional.

IT IS FURTHER ORDERED that the defendant City of Kenosha is enjoined from denying any application for the renewal of a liquor license as long as §§ 176.05(1) and 176.05(8) of the Wisconsin Statutes fail to require a hearing meeting the standards of due process set forth in this opinion.

IT IS FURTHER ORDERED that until such time as plaintiffs' license applications are acted upon in a manner commensurate with the due process clause of the Fourteenth Amendment as set forth in the opinion above, the defendant City of Kenosha shall grant plaintiffs Class "B" Fermented Malt Beverage and Intoxicating Liquor Licenses.

Dated at Milwaukee, Wisconsin, this *2nd* day of *August*, 1972.

/s/ Thomas E. Fairchild
Thomas E. Fairchild, Judge,
U.S. Court of Appeals for
the Seventh Circuit

/s/ John W. Reynolds
John W. Reynolds, Chief Judge,
U.S. District Court,
E. D. Wisconsin

/s/ Myron L. Gordon
Myron L. Gordon, Judge,
U.S. District Court,
E. D. Wisconsin

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES (formal parts omitted)

NOTICE IF HEREBY GIVEN that the City of Kenosha, a Wisconsin municipal corporation, the City of Racine, a Wisconsin municipal corporation, and Robert W. Warren, Attorney General of the State of Wisconsin, do hereby appeal to the Supreme Court of the United States from the judgments of the three-judge court in the captioned cases entered on the 14th day of August, 1972, by the three-judge court of the United States District Court for the Eastern District of Wisconsin made up of the Honorable Thomas E. Fairchild, Judge, United States Court of Appeals for the Seventh Circuit; the Honorable John W. Reynolds, Chief Judge, United States District Court, Eastern District of Wisconsin; and the Honorable Myron L. Gordon, Judge, United States District Court, Eastern District of Wisconsin.

This appeal is taken pursuant to 28 U.S.C. §1253.

Dated this 1st day of September, 1972.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ LeRoy L. Dalton
LE ROY L. DALTON
Assistant Attorney General

/s/ Michael S. Fisher
MICHAEL S. FISHER
City Attorney, Kenosha, Wisconsin

/s/ Edward A. Krenzke
EDWARD A. KRENZKE
Deputy City Attorney
Racine, Wisconsin

Attorneys for Defendants-Appellants.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

CITY OF KENOSHA, et al.,

Appellants,

vs.

PETER G. BRUNO, et al.,

Appellees.

MOTION TO AFFIRM JUDGMENT OF DISTRICT COURT

Now come the appellees, Richard Misurelli, Terrance McCue and David Robers by their attorney, Victor C. Cairo, and move the Court for an order affirming the judgment of the District Court for the Eastern District of Wisconsin upon the following grounds:

1.

That the judgment sought to be reviewed by this court raises issues and questions which are unsubstantial and require no further argument or consideration by the court.

2.

That the issues raised by the appellees have been fully considered and decided by numerous decisions of this court.

3.

That the decisions of the Circuit Court are not in conflict on the issues raised by appellants and sustain judgment of the District Court.

That this Motion to Affirm is based on the brief of the appellees filed herewith.

Dated this 15th day of November, 1972.

Victor C. Cairo
Attorney for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

CITY OF KENOSHA, et al.,

Appellants,

vs.

PETER G. BRUNO, et al.,

Appellees.

APPELLEES' BRIEF ON MOTION TO AFFIRM JUDGMENT

QUESTIONS PRESENTED FOR REVIEW

1.

May the officials of the State of Wisconsin who have granted a liquor license to a citizen, who on the expectation that such license will be renewed makes substantial investments in his business, terminate such renewal license without a procedural due process hearing?

2.

May the State of Wisconsin terminate the benefit of such license without affording the citizen:

a. Personal notice that it intends to take away such license.

b. Any prior statement, reason or specification of grounds for such proposed action.

c. Making of any record of such action which can be reviewed by a court of law.

d. The opportunity to present evidence under oath to show that he is entitled to the continued benefit of such license.

e. Cross-examine witnesses who make accusations questioning his good name, honor, reputation, morality and integrity.

3.

Do the provisions of Section 176.05(1) and 176.05(8) in granting local officials the power to deny the renewal liquor license by a legislative hearing without any standards or guidelines or opportunity for review violate the due process clause of the Constitution?

4.

Do the broad powers possessed by the State of Wisconsin in regulating liquor traffic include the power to deny the citizen the right to due process of law?

STATEMENT OF THE CASE

The appellees in these cases, Richard Misurelli and David Robers, are tavern owners in the City of Racine, Wisconsin. In June of 1971 they brought civil rights actions under Title 42 U.S.C. 1983 and Title 28 U.S.C. 1343 alleging that the City of Racine deprived them of their right to due process of law in refusing to renew their liquor license for the license year 1971-1972. That the action of the Racine officials was taken under color of the custom, usages and laws of the State of Wisconsin.

The plaintiffs' cause of action were for declaratory judgment that the Wisconsin liquor licensing statutes are unconstitutional and their prayers for relief were limited to temporary and permanent injunctive relief. Their

Amended Complaints challenged the constitutionality of the Wisconsin Statutes and requested the convening of a three-Judge District Court.

The facts in this case are undisputed and the case was submitted to the District Court on agreed and stipulated facts by all the parties.

Prior to June of 1971 the plaintiffs were owners and operators of tavern businesses in Racine, Wisconsin. The continued ownership and survival of their tavern businesses was dependent entirely upon the renewal of the liquor license for the year 1971 and 1972 beginning on July 1, 1972.

After a number of legislative hearings, on June 7, 1971, the Racine Common Council voted to deny the renewal of the liquor licenses of the plaintiffs for the year 1971-72. These legislative hearings were held pursuant to the authority granted to the Council by the Wisconsin Statutes.

The plaintiffs were not given any personal notice of such hearings. No specification of charges against granting of the licenses were made known to the plaintiffs prior to the vote to deny the licenses taken on June 7, 1971.

The hearings consisted of citizens speaking for or against the renewal of the license. No speakers were placed under oath nor were plaintiffs given opportunity to cross-examine the speakers. No transcript was ever made of what was said at the hearings or of the action taken by the City of Racine. A previously prepared and undisclosed written statement as to the reasons for denying plaintiffs' license was presented to the Racine Common Council just prior to their vote to deny on June 7, 1971.

The reasons given in the written report for the denial of the license were that the plaintiffs, Richard Misurelli and David Robers, by their method of operation during the prior year caused an "increase in prostitution, promiscuity and venereal disease in the City of Racine and made it

a city of ill-repute." This written report was printed and given extensive publicity in newspapers in Southeastern Wisconsin.

The appellees commenced civil rights actions under 42 U.S.C. 1983 and 28 U.S.C. 1343 alleging that the municipalities deprived them under color of the statutes and customs of Wisconsin of their right to due process of law under the Constitution and laws of the United States. Their complaints asked for declaratory judgment and injunctive relief.

To preserve the status quo, District Judge John W. Reynolds issued a temporary injunction ordering the cities to issue licenses to the appellees until further order of the Court. Judge Reynolds requested the convening of a three-Judge court since the appellees were in effect challenging the constitutionality of the Wisconsin Statutes.

In a Decision and Order entered on August 2, 1972, the three-Judge District Court found that insofar as the provisions of Sections 176.05(1) and 176.05(8) of the Wisconsin Statutes permit the denial of a renewal liquor license without a due process adversary hearing are unconstitutional. The decision is reported as *Misurelli* v. *City of Racine,* 346 F. Supp. 43.

The pertinent provisions of these statutes are:

> "176.05 Liquor licenses. (1) AUTHORITY TO GRANT LICENSES. Each town board, village board and common council may grant retail licenses, under the conditions and restrictions in this chapter contained, to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors.
>
> • • •

(8) ANNUAL LICENSE MEETINGS. All town and village boards and common councils, or the duly authorized committees of such councils, shall meet not later than May 15 of each year and be in session from day to day thereafter, so long as it may be necessary, for the purpose of acting upon such applications for license as may be presented to them on or before April 15, and all applications for license so filed shall be granted, issued or denied not later than June 15 for the ensuing license year, provided that nothing shall prevent any governing body from granting any licenses which are applied for at any other time. As soon as an application has been approved, a duplicate copy thereof shall be forwarded to the secretary of revenue. No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection."

ARGUMENT

I.

DECISION FINDING WISCONSIN STATUTORY LICENSING PROCEDURE UNCONSTITUTIONAL UNDER DUE PROCESS CLAUSE CONSISTENT WITH DECISIONS OF THIS COURT.

From the earliest to its most recent decisions, this Court has insisted that due process of law is basic to our society and binding on the states where federally protected rights are involved.

The whole evolution of procedural due process has been in the direction requiring fair procedures where state action affects protected interests of a citizen. Where federal rights are involved due process commands that not only state procedure be adequate to insure a fair hearing but that it also provide adequate means for judicial review of federal claims. These safeguards are necessary to check arbitrary and lawless exertion of power and that a state will employ reasonable and civilized standards in its administration of laws that affect the lives of its citizens.

The principal purpose of the Due Process Clause is to insure that state power is exerted only pursuant to procedures adequate to vindicate individual rights. The extent and nature of these rights are delineated in the recent case of *Board of Regents* v. *Roth*, ... U.S. ....., 33 L. Ed. 548, 92 S. Ct. ..... (June 29, 1972):

> "The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated the right to some kind of prior hearing is paramount.

'Liberty' and 'property' are broad and majestic terms. They are among the '(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew two well that only a stagnant society remains unchanged.' (Citations omitted) For that reason the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.

While this Court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment) the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."

In *Bell* v. *Burson*, this Court specifically rejected the privilege theory with respect to licenses issued by the states who have traditionally revoked such licenses summarily and without any hearing. Once such licenses are issued they become important rights or interests protected by due process requirements.

"Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are

not to be taken away without that procedural due process required by the Fourteenth Amendment. Sniadach v. Family Finance Corp. 395 U.S. 337, 23 L Ed 2d 349, 89 S Ct 1820 (1969); Goldberg v. Kelly, 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' "

Bell v. *Burson,* 402 U.S. 535, 29 L Ed 90, 91 S Ct 1506 (1971)

The recipient of welfare payments similarly has a protected interest.

"Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are '"a privilege" and not a "right".' Shapiro v. Thompson, 394 US 618, 627 n 6, 22 L Ed 2d 600, 611, 89 S Ct 1322 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, . . ."

Goldberg v. *Kelly,* 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011

An individual has a protected interest in his good name and standing in the community. Where a state makes accusations affecting his integrity, reputation or morality, notice and an opportunity to be heard are essential.

"Yet certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play. Wieman v. Updegraff, 344 US 183, 191, 97 L Ed 216, 222, 73 S Ct 215. '(T)he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hard-

ships of a criminal conviction, is a principle basic to our society.' Anti-Fascist Committee v. McGrath, 341 US 123, 168, 95 L Ed 817, 852, 71 S Ct 624 (Frankfurter, J., concurring).

Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. 'Posting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one."

Wisconsin v. *Constantineau,* 400 US 433, 27 L Ed 2d 515, 91 S Ct 507.

II.

JUDGMENT OF DISTRICT COURT IS IN ACCORD WITH ALL DECISIONS OF CIRCUIT COURTS.

A number of Circuit Courts have passed upon the precise question presented for review by the appellants. With one exception these courts have uniformly held that liquor licensing is subject to the requirements of due process applicable either to a new or renewal applicant for a license.

The leading case is *Hornsby* v. *Allen,* 326 Fed 2d 605 (5th Circ. 1964) which held that a new applicant for a liquor license was entitled to due process in the consideration of his application for such license.

". . . Since licensing consists in the determination of factual issues and the application of legal criteria to them—a judicial act—the fundamental requirements of due process are applicable to it. Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence, see Tadano v. Manney, 160 F. 2d 665, 667 (9th Cir. 1947), which is usually equated with adequate notice and a fair hearing, see Opp Cotton Mills v. Administrator, 312 U.S. 126, 61

S. Ct. 524, 85 L. Ed. 624 (1941). Although strict adherence to the common-law rules of evidence at the hearing is not required, see Crowell v. Benson, 285 U.S. 22, 48, 52 S. Ct. 285, 76 L. Ed. 598 (1932), the parties must generally be allowed an opportunity to know the claims of the opposing party, Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L. Ed. 1129 (1938), to present evidence to support their contentions, see id. 304 U.S. at 18, 58 S. Ct. at 776, 82 L. Ed. 1129, and to cross-examine witnesses for the other side, Reilly v. Pinkus, 338 U.S. 269, 70 S. Ct. 110, 94 L. Ed. 63 (1949). Thus it is not proper to admit ex parte evidence, given by witnesses not under oath and not subject to cross-examination by the opposing party.

The *Hornsby* case was approved and followed in *Barnes* v. *Merritt,* 428 Fed 2d 8 (5th Cir. 1970):

"According to Hornsby v. Allen, et al., 326 F. 2d 605 (5 Cir. 1964), rehearing denied 330 F. 2d 55, the lack of ascertainable standards is a violation of due process actionable under 28 U.S.C. § 1343(3). Although the facts in *Hornsby* are not identical to those in the instant case, the decision is applicable. In *Hornsby,* an application for a license to operate a retail liquor store in Atlanta, George, was denied by the Mayor and Board of Aldermen and the applicant brought suit under 28 U.S.C. § 1343 claiming that the denial violated due process in that she was afforded no hearing, knew of no standards which had to be met to obtain a license and was given no reason for the denial. The court held that the fundamental requirements of due process are applicable to the licensing process; and adherence to the principle of due process requires that prescribed standards be established by city officials."

The *Hornsby* case has been cited with approval by this Court noting that it dealt with liquor licensing in support of its decision that due process requires a hearing in public assistance cases. *Goldberg* v. *Kelly,* 397 U.S. 254, 262 n. 9, 90 S Ct 1011 25 L. Ed. 2d 287 (1969).

In an earlier decision of the Sixth Circuit in *Glicker* v. *Michigan Liquor Control Commission,* 160 F 2d 96 (1947) came to the same conclusion:

> "The ruling of the District Court cannot be sustained on principle that the regulation of the liquor tranffic by the State is in the exercise of its police power and therefore not subject to the constitutional restrictions referred to, although there are state decisions to that effect. It is well settled under the decisions of the U. S. Supreme Court that a state police regulation is, like any other law, subject to the equal protection clause of the Fourteenth Amendment. Atchison, Topeka & Santa Fe Railway v. Vosburg, 238 U.S. 56, 59, 35 S Ct 675, 59 L Ed 1119, L.R.A. 1915E, 953; Connolly v. Union Sewer Pipe Co., 184 US 540, 558, 559, 563, 22 S Ct 431, 46 L Ed 679; see also Asher v. Ingels, D.C., S.D.Cal., 13 F. Supp. 654, 658, 659, and cases there cited; Compare Giozza v. Teirnan, supra, 148 US 657, at page 662, 13 S Ct 721, 37 L Ed 599; Power Manufacturing Co. v. Saunders, supra, 274 US 490, 494, 47 S Ct 678, 71 L Ed 1165.
>
> We recognize the right of a state to regulate, or even prohibit, through the exercise of its police power the pursuit of certain businesses and occupations which because of their nature may prove injurious or offensive to the public. Such regulation is not prohibited by the Fourteenth Amendment. Murphy v. California, 225 US 623, 32 S Ct 697, 56 L Ed 1229, 41 L.R.A., N.S., 153. But it is equally well settled that such regulation is not unlimited in scope, but is subject to the limitations imposed by that amendment. While the Federal Government does not have the right to regulate such matters, which are exclusively under the control and regulation of the state, yet it does have the right, by virtue of the Fourteenth Amendment, to prevent such regulation from being arbitrary or discriminatory. Allgeyer v. Louisiana, 165 US 578, 17 S Ct. 427, 41 L Ed 832; Adams v. Tanner, 244 US 590, 37 S Ct 662, 61 L Ed 1336, L.R.A. 1917F, 1163 Ann. Cas. 1917D, 973; Tyson & Brother United Theatre Ticket Officers v. Banton, 273 US 418, 47 S Ct 426, 71 L Ed 718, 58 A.L.R. 1236; Power Manufacturing Co.

v. Saunders, supra, 274 U.S. 490, 47 S Ct 678, 71 L Ed 1165; Frost v. Corporation Commission, supra, 278 U.S. 515, 49 S Ct 235, 73 L Ed 483. The rule is equally as applicable where the business or occupation being regulated is not a franchise or property right, but is merely a privilege granted or withheld by the state at its pleasure. Frost & Frost Trucking Co. v. Railroad Commission, 271 US 583, 591-594, 46 S Ct 605, 70 L Ed 1101, 47 A.L.R. 457."

Although dealing with a license to carry on fund raising campaigns, the Seventh Circuit case of *Adams* v. *Park Ridge,* 293 Fed. 2d 585 (1961) adopts the *Hornsby* rule that an applicant is entitled to due process before it is rejected:

". . . We find that the defendants' position in this respect vulnerable in view of the fact that the 1928 ordinance contains no definitive standards or other controlling guides governing the action of the City Council in granting or withholding a permit for charitable fund raising."

The appellants' appeal is based entirely on the Sixth Circuit decision in *Lewis* v. *City of Grand Rapids,* 356 F 2d 276 (1966) which is the only Circuit Court which has reached the opposite result. The court in the *Lewis* case was relying on an 1890 decision of this Court in *Crowley* v. *Christensen,* 137 US 86, 11 S Ct 13, 34 L Ed 620 holding that a license to sell or deal in liquor was a pure privilege revokable at the will of the legislature.

As we have already pointed out in our brief, the 'privilege' doctrine upheld in the *Lewis* and *Crowley* cases has been completely rejected by this Court in *Bell* v. *Burson,* supra, *Board of Regents* v. *Roth,* supra and *Goldberg* v. *Kelly, supra.* We quote from the *Roth* case at page 557:

". . . For that reason the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."

Moreover, this Court has in numerous decisions established that the regulation of the liquor traffic is not insulated from the precepts of due process. See *Wisconsin* v. *Constantineau,* supra, and *Goesaert* v. *Cleary,* 335 US 464, 69 S Ct 198, 93 L Ed 163.

III.

SERIOUS CHARGES MADE AGAINST APPELLEES REQUIRED DUE PROCESS BY RECENT DECISIONS OF THIS COURT.

In giving the reasons for the denial of the liquor license, the Racine officials made damaging accusations against Robers and Misurelli involving their personal integrity.

As is set forth in Appellants Appendix at page 115, the City of Racine denied Robers and Misurelli a license because their manner of doing business caused an increase in prostitution, venereal disease and promiscuity in the City of Racine and changed the reputation of the city to one of ill repute.

These accusations were never made known to Robers or Misurelli until after the Racine Common Council voted to deny their licenses. At no time were they ever given an opportunity to refute such charges. They were published extensively in newspapers in Southeastern Wisconsin. These charges certainly affected their honor and reputation in the community.

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '(W)here a person's good name,

reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' "

Board of Regents v. *Roth*, ... U.S. ....., 33 L Ed 2d 548, 92 S Ct—(June 29, 1972)

IV.

WISCONSIN STATUTE UNCONSTITUTIONAL ON ITS FACE.

Section 176.05(1) of the Wisconsin Statutes contains the following delegation of power to local licensing bodies:

> "Each town board, village board and Common Council *may grant retail licenses, under conditions and restrictions of this chapter . . . to such persons entitled under this chapter as they deem fit . . .*"

Section 176.05(8) requires such boards to have annual license meetings from May 15 to June 15 of each year for the purpose of passing on such license.

This statute contains no provision whatsoever for notice or hearing to an applicant or holder of a liquor license. The local licensing body merely holds meetings for the purpose of passing on the license. Notice of these meetings are published in a newspaper or posted to the bulletin board of the City Hall. An applicant does not receive any personal notice of such meetings.

The statute contains no guidelines or standards to guide the Common Council in making its decision to grant or deny a license. The statute makes no provision that a record be made of these public meetings.

The case of the appellee, Jeanette Stenzel, sharply illustrates the arbitrary power possessed by the Common Council. Mrs. Stenzel has held a liquor license issued to her by the City of Kenosha for more than 20 years. She

has an investment in her tavern of considerably more than $20,000.00.

On June 7, 1971, the Kenosha Common Council voted to renew Mrs. Stenzel's license. At a later meeting held two weeks later, on June 21, 1972, the Council changed its mind and voted to deny her license. Mrs. Stenzel was given no notice that the City was going to reconsider her application nor was she present at the June 21 meeting. She first learned of the denial by its announcement in the newspapers the next day.

This Court has never sustained such a state statute that is so fundamentally inconsistent with the Due Process Clause of the Fourteenth Amendment. The statute grants local officials stark unguided and unreviewable power to give a license to whomever they please. The choice is left to the whim of the official—the very antithesis of due process and rule by law. *Seattle Trust Co.* v. *Roberge,* 278 US 116, 73 L Ed 210, 49 S Ct 50 (1928), *Yick Wo* v. *Hopkins,* 118 US 356, 30 L Ed 220, 6 S Ct 1064, *Wisconsin* v. *Constantineau,* supra.

In a number of decisions, the Wisconsin Supreme Court has upheld the constitutionality of these statutes interpreting them to permit local officials to deny a license by a legislative trial without any of the due process safeguards. We quote from its most recent decision in *State, ex rel Ruffalo* v. *Common Council of City of Kenosha,* 38 Wis. 2d 518, 157 N.W. 2d 568 (1968):

> "Ruffalo argues that upon renewal he is entitled to a trial-type hearing upon his application under the due-process clause of the constitution. *Hornsby* v. *Allen,* supra. However, the granting of a liquor license is a legislative function which does not require a trial-type hearing to comport with due process. From time immemorial, legislators and bodies exercising

the legislative function have held the legislative type of hearing wherein one is given notice of the hearing and a fair opportunity to state his position on the issue. The right to a hearing and a record sufficient for judicial review to determine whether the exercise of the administrative power was capricious or arbitrary is fundamental."

V.

CONCLUSION

The decision of the District Court is in harmony with this Court's insistence that state action which affects substantial interests of a citizen in liberty or property be exercised within the due process procedural safeguards. Without such Federal supervision of Constitutional rights, state power would become nothing more than government by whim of the state officials wielding the power. As was said in *Marbury* v. *Madison,* 1 Cranch 137, 2d L Ed 60 (1803), ours is "termed a government of laws, not men."

Of critical importance in these cases is the fact that the District Court was not called upon to determine the adequacy or inadequacy of the Wisconsin liquor licensing procedure. In Wisconsin, the licensing of a tavern business is left entirely to the unguided and unreviewable discretion and whim of the Common Council or Town Board.

The appellees respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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FEB 27 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-658

CITY OF KENOSHA,
A Wisconsin Municipal Corporation;
CITY OF RACINE,
A Wisconsin Municipal Corporation;
ROBERT W. WARREN,
Attorney General of the State of Wisconsin,
Intervening Defendant;
Appellants,

v.

PETER G. BRUNO;	No. 71-C-330
BRUCE BLEASHKA;	No. 71-C-331
SLEEPY'S, INC.;	No. 71-C-332
FRED KAUZRICH;	No. 71-C-333
JEANETTE STENZEL;	No. 71-C-334
CHARLES WIGINTON;	No. 71-C-352
RICHARD A. MISURELLI and TERRANCE MC CUE;	No. 71-C-316
GO-GO OF RACINE, INC., A Wisconsin Corporation, THEODORE F. WITHERIL, and JEROME J. RUETZ, JR.; and	No. 71-C-317
DAVID H. ROBERS;	No. 71-C-335

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANTS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-658

CITY OF KENOSHA,
A Wisconsin Municipal Corporation;
CITY OF RACINE,
A Wisconsin Municipal Corporation;
ROBERT W. WARREN,
Attorney General of the State of Wisconsin,
Intervening Defendant;
Appellants,

v.

PETER G. BRUNO;	No. 71-C-330
BRUCE BLEASHKA;	No. 71-C-331
SLEEPY'S, INC.;	No. 71-C-332
FRED KAUZRICH;	No. 71-C-333
JEANETTE STENZEL;	No. 71-C-334
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RICHARD A. MISURELLI and TERRANCE MC CUE;	No. 71-C-316
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DAVID H. ROBERS;	No. 71-C-335

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin is reported as *Misurelli v. City of Racine* (1972), 346 F. Supp. 43, and is included in the appendix to the jurisdictional statement at page 117.

The opinions and temporary restraining orders of the Honorable John W. Reynolds, Judge of the United States District Court for the Eastern District of Wisconsin, entered on October 21, 1971, are reported as *Bruno et al. v. City of Kenosha* (1971), 333 F. Supp. 726, 731, 732, 733, and 735, and are included in the appendix to the jurisdictional statement at pages 102-117.

The decision and order in the Kenosha cases, which adopts the reasoning of the *Misurelli* case, is unreported and is included in the appendix to the jurisdictional statement at pages 129-130.

JURISDICTION

These are actions for declaratory and injunctive relief under the Civil Rights Act, 42 U.S.C. §1983. Jurisdiction is said to be involved under Title 28 U.S.C. §1343 (3). The three-judge court indicates in its decision that if civil rights jurisdiction were not proper each plaintiff could assert the necessary $10,000 controversy requirement of 28 U.S.C. §1331. It is alleged that secs. 176.05 (1) and 176.05 (8) of the Wisconsin Statutes violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The statutory provision conferring jurisdiction on this court to review the judgment by direct appeal is 28 U.S.C. §1253.

Cases sustaining the jurisdiction of the court to hear the appeal are *Goldstein v. Cox* (1970), 396 U.S. 471, 90 S.Ct. 671, 24 L.Ed. 2d 663, and *Wyman v. Rothstein* (1970), 398 U.S. 275, 90 S.Ct. 1582, 26 L.Ed. 2d 218.

CONSTITUTIONAL PROVISION INVOLVED

Article XIV, Section 1, Amendments to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XXI, Section 2, Amendments to the United States Constitution:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

WISCONSIN STATUTES INVOLVED

Section 66.054 (5) (b):

> The governing body of every city, village and town shall have the power, but shall not be required, to issue licenses to wholesalers and retailers for the sale of fermented malt beverages within its respective limits, as herein provided. Said retailers' licenses shall be of 2 classes, to be designated as Classes "A" and "B."

Section 66.054 (5) (c) 1:

> The electors of any city, village or town may, by ballot, at the spring election, determine whether or not Class "B" retail licenses shall be issued for the sale of fermented malt beverages for consumption on or off the premises where sold, or whether or not Class "A" retail licenses shall be issued for the sale of fermented malt beverages for consumption away from the premises

where sold, provided that whenever a number of qualified electors of any city, village or town equal to, or more than, 15% of the number of votes cast therein for governor at the last general election, shall present to the clerk thereof a separate petition on each question, in writing, signed by them, praying that the electors thereof may have submitted to them any such question and shall file such petition with the clerk at least 30 days prior to the first Tuesday of April next succeeding. Within 5 days of the filing of any such petition such clerk shall determine by careful examination the sufficiency or insufficiency thereof and state his findings in a signed certificate dated and attached to such petition, and within 5 days give written notice to the department of justice, at Madison, Wisconsin, that such petition has been filed with him, stating the question to be submitted, the date of filing such petition, the name of the town, its post-office address, village or city, and such clerk after and not until he shall have determined that such petition is sufficient and shall have given the notice to the department of justice as hereinabove set forth, shall forthwith make an order providing that such question shall be so submitted on the first Tuesday of April next succeeding the date of such order. Said petition must be circulated by one or more qualified voters residing in the town, village or city wherein such local option question will be submitted. The preparation of such petition shall be governed as to the use of more than a single sheet of paper, the dates of signatures, the places of residence of signers, and verification thereof, by the provisions of s. 8.15 as far as applicable. No petition shall be circulated prior to 60 days before the date on which it must be filed, and no signature shall be counted unless it has been affixed to such petition and bears date within 60 days prior to the time for the filing thereof. At such election a separate ballot box shall be provided for such ballots. Such ballots shall conform to the provisions of s. 5.64 (2).

Section 66.054 (14):

(a) The action of any city council, village or town board in the granting or revocation of any license, or

the failure of said city council, village or town board to revoke any license for good cause because of the violation of any of the provisions of this section may be reviewed by any court of record in the county in which the application for said license was filed or said license issued, upon application by any applicant, licensee or any citizen of such city, town or village.

(b) The procedure in said review shall be the same as in civil actions instituted in said court. The person desiring such review shall file his pleadings, which shall be served upon the city council, village or town board in the manner provided for service in civil actions by statute, and a copy thereof shall be served upon the licensee. The said city council, village or town board or licensee shall have 20 days within which to file his or their answer to said complaint, and thereupon said matter shall be deemed at issue and hearing may be had before the presiding judge of said court within 5 days, upon due notice served upon the opposing party. The hearing shall be before the presiding judge without a jury. Subpoenas for witnesses shall be issued and their attendance compelled, in accordance with the provisions of statute relating to civil proceedings. The decision of the presiding judge shall be filed within 10 days thereafter, and a copy thereof transmitted to each of the parties, and said decision shall be binding unless appeal be had to the supreme court in the manner provided by statute for appeals in civil actions.

Section 176.05 (1), (5), (8), and (9):

(1) AUTHORITY TO GRANT LICENSES. Each town board, village board and common council may

grant retail licenses, under the conditions and restrictions in this chapter contained, to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors. No member of any such town board, village board or common council shall sell directly or indirectly or offer for sale, to any person, firm, or corporation that holds or applies for any such license any bond, material, product, or other matter or thing that may be used by any such licensee or prospective licensee in the carrying on of his or its said business.

(5) * * * Except as provided in sub. (6), all such licenses shall remain in force until July 1 next after the granting thereof, unless sooner revoked; * * *.

(8) ANNUAL LICENSE MEETINGS. All town and village boards and common councils, or the duly authorized committees of such councils, shall meet not later than May 15 of each year and be in session from day to day thereafter, so long as it may be necessary, for the purpose of acting upon such applications for license as may be presented to them on or before April 15, and all applications for license so filed shall be granted, issued or denied not later than June 15 for the ensuing license year, provided that nothing shall prevent any governing body from granting any licenses which are applied for at any other time. As soon as an application has been approved, a duplicate copy thereof shall be forwarded to the secretary of revenue. No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection.

(9) WHERE AND TO WHOM LICENSES NOT GRANTED. No license or permit shall be granted to any person or persons under the age of 18 years for the sale of any such intoxicating liquors, or to any person who is not of good moral character and a full citizen of the United States and of this state and who has not resided in this state continuously for at least one year prior to the date of filing the application; nor shall any such license be granted or issued to any person who has habitually been a petty law offender, or has been convicted of an offense against the laws of this state punishable by imprisonment in the state prison, unless the person so committed has been duly pardoned. The provisions of this subsection shall not apply to a Wisconsin corporation; such provisions apply, however, to all officers and directors of any such corporation.

Section 176.05 (10) (b):

No retail "Class B' liquor license shall be issued to any person who does not have, or to whom is not issued, a Class "B" retailer's license to sell fermented malt beverages under s. 66.054.

Section 176.11:

Upon complaint made in writing under oath by any resident in, and filing with the clerk of, any town, village or city that any such licensed person therein has violated any provision of this chapter or keeps or maintains a disorderly or riotous, indecent or improper house, or that he has sold or given away any intoxicating liquor to any minor, or to persons intoxicated or bordering upon intoxication, or to known habitual drunkards, or that he has not observed and obeyed any order of such supervisors, trustees, aldermen, or county superintendent of the poor, or any of them, made pursuant to law, the proper town board, village board or common council shall

issue a summons, to be signed by the clerk, directed to any peace officer or constable therein, commanding the person so complained of to appear before them on a day and at a place in such summons named, not less than 3 nor more than 10 days from its date, and show cause why his license should not be revoked. Such summons shall be served at least 3 days before the time at which such person is commanded to appear, and may be served either personally or upon the person in charge of the place to which such license relates.

Section 176.12:

If such person shall not appear as required by the summons the complaint shall be taken as true; and if the board shall deem its allegation sufficient the license shall be revoked, and notice thereof shall be given to the person whose license is so revoked; but if such person shall appear and deny the complaint each party may produce witnesses and be heard by counsel. If upon such hearing the board shall find the complaint to be true the license shall be suspended for not less than 10 days nor more than 90 days or revoked, and if untrue the proceeding shall be dismissed without costs to the accused, and if the complaint be found by the board to be malicious and without probable cause the cost shall be paid by the complainant, and the board may require security therefor before issuing the summons as aforesaid. When a license is revoked it shall be so entered of record by the clerk, and no other license shall be granted to such person within 12 months of the date of its revocation nor shall any part of the money paid for any license so revoked be refunded.

QUESTIONS PRESENTED

1. Whether the privilege to renew combination Class "B" fermented malt beverage and intoxicating liquor licenses which expire at the end of a licensing year constitutes "liberty" or "property" within the meaning of the due process clause of the Fourteenth Amendment.

Answered by the three-judge court in the affirmative.

2. If a protected interest can be identified, is a legislative-type hearing coupled with availability of subsequent court review a *meaningful* hearing under the due process clause?

Answered by the three-judge court in the negative.

3. Whether the abstention doctrine should apply to a three-judge court action where the prayer for relief includes the court-ordered issuing of a liquor license and the state remedies have not been exhausted.

Answered by the three-judge court in the negative.

STATEMENT OF THE CASE

Appellees were applicants for renewal of their Class "B" fermented malt beverage and intoxicating liquor licenses which were expiring on July 1, 1971, except Richard A. Misurelli who was applying for the license for the first time, apparently in place of a silent partner, Terrance McCue.

Following the adoption of the Twenty-first Amendment to the United States Constitution the Wisconsin State Legislature directed its attention to the adoption of controls over the subject of the trafficking in intoxicants. Among the major issues resolved by the legislature was the question of whether retailing intoxicants should be a wholly governmental function or whether the private sector should be allowed to take part in the retailing of beer and intoxicating liquors. The legislature determined that the private sector would be allowed to participate in the liquor trade under such restraints and regulations as deemed necessary by the legislature. Those regulations and restraints manifested themselves in ch. 13 of the Laws of 1933, presently found in chs. 66 and 176 of the Wisconsin Statutes, and which may be classified in the field of retail sales as "local option." In other words, each local unit of government, towns, villages and cities, have the authority to determine whether liquor and beer will be sold within the boundaries of their jurisdiction, how many licenses within a state-designated limit will be issued, where such establishments will be located, and who shall receive licenses.

Class "A" licenses are issued for what are commonly called liquor stores selling packaged liquor and beer for consumption off the premises. Class "B" retail liquor licenses are for sale of liquor and beer by the drink on the premises,

commonly known as "bar" or "tavern" licenses. Section 176.05 (10) (b) provides that:

> "No retail 'Class B' liquor license shall be issued to any person who does not have, or to whom is not issued, a Class 'B' retailer's license to sell fermented malt beverages under s. 66.054."

Thus, although a license may be obtained to operate a retail Class "B" beer establishment without having a license to sell intoxicating liquor, the opposite is not true.

The scheme of local licensing set out in the statutes, sec. 176.05 (8), provides that new and renewal licenses must be applied for prior to April 15 of each year and that the town and village boards or common councils of cities must meet not later than May 15 of each year and be in session from day to day thereafter so long as it may be necessary for the purpose of acting upon such applications and shall grant or deny such licenses not later than June 15 for the ensuing license year.

Each license is good for one year or less and is renewed at the option of the licensing body. Each applicant must provide notice in the local newspaper that he is applying for a license, sec. 176.09, Wis. Stats.

Section 176.05 (1) provides that each municipality may "grant retail licenses * * * to such persons * * * as they deem proper." Section 176.05 (9) specifies persons to whom licenses shall not be granted.

At the annual license meetings required by sec. 176.05 (8), Wis. Stats., members of the public and police authorities are heard as to complaints concerning any applicant, and the applicant may if he chooses appear in his own behalf and be

heard concerning his qualifications and desirability as an applicant for a beer or liquor license or a combination license. These "annual license meetings" are conducted by the legislative bodies of the towns, villages and cities in the State of Wisconsin and have been termed "legislative hearings."

If, after the hearing, the legislative body decides not to renew the license of an applicant, sec. 176.05 (8) requires "* * * a statement on the clerk's minutes as to the reasons for such rejection."

The applicant thereafter has two remedies available to test the action of the legislative body in court prior to the ensuing licensing year which begins on July 1 of each year. The first remedy relates solely to the fermented malt beverage license, and this is found in sec. 66.054 (14), Wis. Stats. The action which is brought in the county court in a full-fledged trial on the issues surrounding the denial must be litigated within five days after joinder of issue and decided by the judge within ten days after trial.

The other procedure available to an applicant who has been denied a renewal license which applies to both beer and intoxicating liquor, and would also apply to an original application, is by writ of certiorari in the circuit court of the county.

The appellees, six from the City of Kenosha and three from the City of Racine, are persons engaged in the operation of taverns featuring nude and seminude dancing in those cities. Each of the appellees, between June, 1970, and June, 1971, held a Class "B" combination liquor and beer license duly issued by the appellant cities pursuant to chs. 176 and 66

of the Wisconsin Statutes. Prior to June, 1971, each filed with their city clerks appropriate and timely applications for the renewal of their Class "B" licenses for the license year 1971-1972. Public hearings were held by the city councils of each city, and for the purposes of those hearings the appellees, applicants for renewals, were segregated from the other applicants because, unlike the other applicants, they featured nude entertainment in their bars. During the public hearings they were treated as a group rather than as individuals, and at these hearings residents of the cities were permitted to speak on the subject of the appellees' license renewals. Speakers, including attorneys representing the appellees, spoke both for and against the issuance of licenses. No attempt was made to deny that the applicants featured nude entertainment. No request was made by appellees' attorneys to cross-examine any witness, and witnesses were not sworn under oath. (Jurisdictional Statement, A. 103). The appellees appeared at the hearing and made statements, but a verbatim transcript of the hearing was not made. (Jurisdictional Statement, A. 118).

On June 1, 1971, after holding public hearings, the City Council of Racine, acting on the recommendation of its License and Welfare Committee, refused to renew the licenses of Go-Go of Racine, Inc., and David H. Robers because, among other things, the committee concluded that because of the manner of operation of their business, using nude entertainment, the reputation of the City of Racine was changing to that of a city of "ill repute." It was also concluded that an undesirable element was being attracted to the community which fostered an increase in prostitution, promiscuity, and venereal disease. (Jurisdictional Statement, A. 115).

On the same date the City of Racine refused to issue an initial license to Richard A. Misurelli, apparently a silent partner of Terrance McCue who had held the 1970-1971 license but did not apply for renewal, for the same reasons that Go-Go of Racine, Inc., and David H. Robers were denied renewals.

On June 7, 1971, after holding public hearings, the City of Kenosha denied the renewals of Peter G. Bruno, Bruce Bleashka, Sleepy's, Inc., Fred Kauzrich, and Charles Wiginton because, among other things, the nude dancing helped furnish an atmosphere conducive to the flourishing of prostitution, creating a bad environment, and setting improper moral standards for the children in the community. (Jurisdictional Statement, A. 104).

Appellee Jeanette Stenzel was granted renewal of her license on June 7, 1971. However, on June 21, 1971, the City Council of Kenosha voted to reconsider Stenzel's license, and upon reconsideration voted to deny her a license because she had used nude dancing entertainment in her establishment.

On June 30, 1971, the Honorable John W. Reynolds issued a temporary restraining order which ordered the City of Kenosha to issue retail fermented malt beverage and intoxicating liquor licenses to Bruno, Bleashka, Sleepy's, Inc., and Fred Kauzrich. Subsequently, Judge Reynolds ordered licenses be issued to the other appellees, including Richard A. Misurelli, who had not held a liquor license for the year 1970-1971. (Jurisdictional Statement, A. 112-113).

After the filing of amended complaints on September 21, 1971, which specifically attacked the constitutionality of sec. 176.05 (1) and (8), Wis. Stats., under the due process

clause of the Fourteenth Amendment because the statutes permit denial of license without judicial-type hearing, Judge Reynolds issued memorandum opinions and orders in each of the cases directing that the temporary restraining orders then outstanding in each of the cases would be continued until further order of the court, thus continuing the court-ordered licenses. (Jurisdictional Statement, A. 102-110).

After the convening of a three-judge court, the Governor and the Attorney General of Wisconsin were notified of the pendency of the actions and the Attorney General intervened as a defendant. The parties stipulated to the facts and each moved for summary judgment. In ruling on the motion, the three-judge court found that Racine, acting upon the appellees' applications for renewal of their liquor licenses, except Misurelli who was a first-time applicant, held a public hearing before the City Council Licensing Committee in which all citizens of the community were allowed to make statements for and against the nude dancing activities in the taverns operated or proposed to be operated by the appellees. Citizens expressing their views were not placed under oath and they were not cross-examined. No verbatim transcript was made and none was requested by the appellees. The appellees appeared at the hearing and made statements. Notes were taken by the committee and a written report was filed with the city council recommending that licenses not be issued to Go-Go of Racine, Inc., Richard A. Misurelli, and David H. Robers. (Jurisdictional Statement, A. 114-116). The court found that substantially the same procedure was followed by the City of Kenosha in denying licenses to the other appellees. (Jurisdictional Statement, A. 104-105).

The temporary restraining orders entered by Judge Reynolds on October 21, 1971, protected the licenses of the appellees through the 1971-1972 licensing year and that part of the 1972-1973 licensing year from July 1, 1972, to the August 2, 1972, decision and order of the three-judge court directing the appellant cities to grant Class "B" fermented malt beverage and intoxicating liquor licenses to all of the establishments featuring nude dancing. Judgment was entered on August 14, 1972, and appeal was taken September 1, 1972. Probable jurisdiction was noted on January 8, 1973.

SUMMARY OF ARGUMENT

The three-judge court of the United States District Court for the Eastern District of Wisconsin did not identify the protected interest in liberty or property which it contended the due process clause of the Fourteenth Amendment protects. The court misplaced its reliance on *Constantineau* because there the protected interest was clearly the liberty of the individual to buy liquor unless he fell within a disqualifying provision of the law after a due process hearing.

Just as the professor in *Roth* had no protected interest after the expiration of his one-year employment contract, the holder of a fermented malt beverage and intoxicating liquor license under Wisconsin law has no protected interest after the expiration of the license and this court has never recognized a property interest in such a license.

If there is an identifiable protected interest, a weighing of the governmental interests against the private interest requires a conclusion that a legislative-type hearing where

the applicant and the citizens of the community can inform the licensing body of their relative positions with availability of court review to test arbitrary, capricious, or discriminatory action by the licensing board meets all requirements of fair play and due process.

The federal court should have stayed its hand under the abstention doctrine and allowed the civil action then pending in the Circuit Court of Racine County, in which the appellee Go-Go of Racine, Inc., was challenging the Wisconsin laws, to determine all issues. Federal courts should not interfere with the operation of a statewide system of liquor enforcement and such interference with state policies appears to be in violation of sec. 2 of the Twenty-first Amendment to the United States Constitution.

ARGUMENT

I. The Privilege To Renew A Combination Class "B" Fermented Malt Beverage And Intoxicating Liquor License Which Expires Under Wisconsin Law At The End Of A Licensing Year Does Not Constitute "Liberty" Or "Property" Within The Meaning Of The Due Process Clause Of The Fourteenth Amendment.

A. The three-judge court did not identify protected interest.

This court has indicated clearly in *Board of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548, and *Fuentes v. Shevin* (1972), 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556, that the procedural due process

requirements of the Fourteenth Amendment apply only to the deprivation of interests which fall within the protection of life, liberty and property contained within the amendment.

Liberty has not been defined with exactness by the court, but in *Roth* it was noted that it includes " '* * * freedom from bodily restraint but also the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized * * * as essential to the orderly pursuit of happiness by free men.' Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 626, 67 L.Ed. 1042."

Recently the court construed this liberty to include the right of privacy and permits a woman to decide with her physician whether to have an abortion unregulated by the state during the first few months of pregnancy. *Roe v. Wade* (1973), — U.S. —, 93 S.Ct. 705, 34 L.Ed. 2d —.

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, a protected interest can be identified under the liberty provisions of the Fourteenth Amendment. *Wisconsin v. Constantineau* (1971), 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed. 2d 515. The same interests can be identified where future opportunity for government employment is involved, *Joint Anti-Fascist Refugee Committee v. McGrath* (1951), 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; eligibility for types of professional employment, *Schware v. Board of Bar Examiners* (1957), 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 2d 796;

Willner v. Committee on Character & Fitness (1963), 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed. 2d 224; and *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed. 2d 1230.

In *Constantineau,* the case which the three-judge lower court apparently feels significant in establishing herein a protected interest in liberty, the individual was denied the right to purchase liquor without an opportunity to confront the person claiming that his conduct warranted being posted and to present his side of the story before he was in fact "posted." The analogy is misplaced. *Constantineau* dealt with the individual's right to purchase liquor, which was a protected interest which could not be denied without due process. In the instant case, the court has failed to identify what protected interest in liberty is involved, except to say that this court has found such protected interests in occupational licenses. It is clear, however, that a fermented malt beverage and intoxicating liquor license cannot be compared with an occupational license.

Accordingly, it must be concluded that the lower court has not identified a protected interest in liberty under the Fourteenth Amendment requiring the application of the due process clause to this type of license.

This court has given further guidance in *Roth* in regard to protected interests under the Fourteenth Amendment's due process clause which involve property. It is noted that property interests are not created by the constitution,

> "* * *Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. * * *" 92 S.Ct. 2709.

Thus, college professors and staff members who are dismissed during the terms of their contracts have interests in continued employment that are safeguarded by due process. *Wieman v. Updegraff* (1952), 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216. In *Roth* the court also pointed out that it had held in *Connell v. Higginbotham* (1972), 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed. 2d 418, the principle applies to a teacher recently hired without tenure or a formal contract but nonetheless with a clearly implied promise of continued employment.

To identify a property interest in a benefit it is clear that the person must have a legitimate claim of entitlement to it and not just a need, desire, or unilateral expectation of the benefit. Thus, in *Roth* the professor had only the protectable interest to employment up to the expiration of his one-year contract. There was no interest in reemployment for the next year and, therefore, although he had a concern in being rehired which could be classified as abstract, he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

It appears that the property interest rationalized by the lower court was the $20,000 stipulated investment that each plaintiff had in his tavern operations. (Jurisdictional Statement, A. 105). Although this particular monetary figure was found only in the decision of the single judge to continue the temporary restraining order, the decision itself has reference to potential monetary damages which would accrue from the denial of a liquor license and the statement that if jurisdiction were not present under the Civil Rights Act each plaintiff would be able to assert the necessary $10,000 controversy requirement of Title 28 U.S.C. §1331. Apparently the court thus concluded that the liquor license has

a monetary value which could be alleged to establish federal court jurisdiction if necessary. This seems to be a tenuous basis on which to conclude that there is a property interest in the renewal of a fermented malt beverage and intoxicating liquor license within the meaning of the due process clause of the Fourteenth Amendment. We think the lower court erred in this respect.

B. This court has never recognized the refusal to issue or renew a liquor license as denying a property right.

Since *Crowley v. Christensen* (1890), 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620, this court has recognized that refusal to issue or renew a liquor license does not deny a property right. The court said, at 137 U.S. 91:

> "* * * The police power of the State is fully competent to regulate the business — to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. * * * It is a matter of legislative will only. * * *"

In *Lewis v. City of Grand Rapids* (6th Cir., 1966), 356 F. 2d 276, the court said: "The only inescapable rule of *Crowley* is that the denial of a hearing, in itself, would not violate the Fourteenth Amendment."

The court went on, at page 286:

> "* * * The traditional municipal interests in regulating the liquor business, together with the problems of conducting this regulation through competent, civic-minded,

> part-time officials, require the use of flexible procedures. These exigencies of city management must not be disregarded by ordering that plaintiff Lewis, and everyone else wishing to become a transferee of a liquor license, receive a process including '* * * *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings.' * * *"

Since the Twenty-first Amendment this court has consistently held that the states possess "* * * broad regulatory power over the liquor traffic within their territories." *United States v. Frankfort Distilleries* (1944), 324 U.S. 293, 299, 65 S.Ct. 661, 664, 89 L.Ed. 951. *Joseph E. Seagram & Sons v. Hostetter* (1966), 384 U.S. 35, 42, 86 S.Ct. 1254, 16 L.Ed. 2d 336.

In *Goesaert v. Cleary* (1948), 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163, Justice Frankfurter placed in proper perspective the relative interest of the state in establishing a legislative scheme for governing and controlling liquor traffic and the rights expressed under the Fourteenth Amendment, 69 S.Ct. 199:

> "* * * The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and untrammeled of legislative powers [of the state]. * * * The [Federal] Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."

Most recently this court in *California v. LaRue* (1972), — U.S. —, 93 S.Ct. 390, 34 L.Ed. 2d 342, said, at 93 S.Ct. 395:

"While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed. 2d 350 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' Still earlier, the Court stated in State Board v. Young's Market Co., 299 U.S. 59, 64, 57 S.Ct. 77, 79, 81 L.Ed. 38 (1936):

> " 'A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth.' "

While this court conceded that the Twenty-first Amendment does not supersede all other constitutional provisions in the area of liquor regulations, leaving room for such recognized protected interests as were identified in *Wisconsin v. Constantineau,* supra, in *LaRue* it did conclude that the Twenty-first Amendment undoubtedly strengthened the case for upholding state regulation of liquor.

The principal case relied on by the three-judge court is *Hornsby v. Allen* (5th Cir., 1964), 326 F. 2d 605. The Wisconsin Supreme Court specifically rejected *Hornsby* in the *Ruffalo* decision. Hornsby brought suit under the Civil Rights Act after being denied a liquor dealer's license. The court said that the licensing power is an adjudicative process and therefore judicial in nature rather than legislative and,

therefore, the due process and equal protection provisions of the Fourteenth Amendment apply in the liquor licensing field. The Hornsby court did not address itself to the question of whether a liquor license is liberty or property within the meaning of the due process clause. Therefore, insofar as the court below relied entirely upon due process requirements, the *Hornsby* case is not persuasive.

Two years after *Hornsby* the due process issue was squarely considered by the Sixth Circuit in *Lewis v. City of Grand Rapids* (6th Cir., 1966), 356 F. 2d 276. Getting directly to the heart of the matter, at page 286, the court quoted the district judge as follows:

> "We recognize that the Michigan Supreme Court and the courts of the other states have held consistently that the due process clause of the United States Constitution does not apply to matters concerning liquor licenses." 222 F. Supp. 384.

On the question of whether a license is property, the court referred to *Scott v. Arcada Township Board* (1934), 268 Mich. 170, 255 N.W. 752, which emphasized the difference between the granting of a license and its revocation, indicating that revocation might indeed require due process. The court pointed out, however, at page 285:

> "* * * Plaintiff Lewis did not own a license to operate a liquor establishment, and the opportunity to seek approval to become an owner was not, in our view, a property right. * * *"

The three-judge court herein, and also the district judge in the *Lewis* case, apparently relied on the decision in *Glicker v. Michigan Liquor Control Commission* (6th Cir., 1947), 160 F. 2d 96, as holding that the licensing board

was required to hold a full-dress adversary hearing before denying approval of a liquor license. However, the *Lewis* appellate court specifically denied such holding in *Glicker* and declined to so hold, page 288. The *Glicker* case held merely that the state under a guise of regulating the liquor business could not deny its citizens equal protection of the law.

The Lewis court said further, at page 289:

> "* * * We recognize some observations in the Hornsby case as being at odds with out conclusion and to that extent we decline to follow it."

In *Atlanta Bowling Center, Inc. v. Allen* (5th Cir., 1968), 389 F. 2d 713, the court sidestepped *Hornsby* and rejected contentions of violation of due process and equal protection where the aldermen and mayor had refused to approve a liquor license for a room at a bowling center, the reasons relating to the location, the nature of the family recreation center, the attraction of minors to an amusement park nearby, and past precedent that liquor licenses were not given to bowling alleys.

Commenting that *Hornsby* is "* * * a case mistakenly thought by too many to be a pledge that if local authorities would not, a Federal Court would, grant a liquor license * * *," p. 714, the court held that the ordinance governing issuance of liquor licenses and emphasizing public interest and welfare and relation of location to other activities, properties and uses gave sufficient notice to applicants that they would be judged on those factors when applying for a liquor license, even though such reasons given when denying application were not expressly articulated in the ordinance.

Accordingly, *Hornsby* is not persuasive because it failed to identify the liberty or property interest which is said

to bring the denial of a retail liquor store license within the due process clause. It is also distinguishable from the instant cases because it appears there was no requirement or opportunity for judicial review.

C. Identifiable protected interests.

The Wisconsin fermented malt beverage license and the combination fermented malt beverage and intoxicating liquor license is issued to the licensee for a period of one year. The Wisconsin Supreme Court has construed the license to be a personal privilege given to the licensee which cannot be the subject of transfer or of contract which would limit or control the discretionary authority of a licensing board. *Smith v. Whitewater* (1947), 251 Wis. 306, 29 N.W. 2d 33; *Smith v. Whitewater* (1947), 251 Wis. 313, 29 N.W. 2d 37; *State v. Bayne* (1898), 100 Wis. 35, 75 N.W. 403.

The Wisconsin license remains in force until July 1 of the next year after the granting of the license unless sooner revoked. The revocation procedure is set out in secs. 176.11 and 176.12, Wis. Stats., and provides for an adequate due process hearing, thus recognizing that while the license is still in force during the one-year period there are protected interests that may not be taken away except by a due process hearing. However, the concept that a liquor license is a continuing property right was rejected by the Wisconsin Supreme Court in two cases decided in 1968, *Marquette Savings & Loan Asso. v. Twin Lakes,* 38 Wis. 2d 310, 156 N.W. 2d 425, and *State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 157 N.W. 2d 568.

In the first case, Marquette Savings and Loan Association held a mortgage on certain real estate which included

a tavern, and a provision in the mortgage provided that the tavern license and all fixtures in the tavern were included with the mortgaged premises and provided that the license could not be sold, transferred or surrendered without the consent of the Marquette Savings and Loan Association. When the property was foreclosed and the municipality subsequently reissued the license to the mortgagor, Marquette Savings and Loan Association started suit and claimed a property and contract right in the license because of the agreement between the licensee and the mortgagee.

The Supreme Court of Wisconsin rejected this position, holding that to permit the licensee and a third party to enter into a contract of this sort would negate the discretionary authority of the licensing board in granting and renewing licenses which would be against public policy.

In *State ex rel. Ruffalo v. Common Countil,* the City of Kenosha refused to renew his combination Class "B" fermented malt beverage and intoxicating liquor license although he had held the license for over 18 years. A petition signed by 70 homeowners and residents objecting to the renewal was filed with the city council and after a legislative-type hearing the renewal was denied by the common council. Ruffalo contended that he had a property right to renewal of the liquor license and that the failure to renew was in effect a revocation which should have followed secs. 176.11 and 176.12, Wis. Stats. The court denied Ruffalo's contentions that he was entitled to a trial-type hearing upon his application under the due process clause of the constitution and in doing so refused to follow *Hornsby.* The court said, at 38 Wis. 2d 518, 524, 157 N.W. 2d 568, 571:

> "* * * However, the granting of a liquor license is a legislative function which does not require a trial-type

hearing to comport with due process. From time immemorial, legislators and bodies exercising the legislative function have held the legislative type of hearing wherein one is given notice of the hearing and a fair opportunity to state his position on the issue. The right to a hearing and a record sufficient for judicial review to determine whether the exercise of the administrative power was capricious or arbitrary is fundamental. We pointed out in *Ashwaubenon v. State Highway Comm.* (1962), 17 Wis. 2d 120, 115 N.W. 2d 498, that in those cases where the judicial branch has the jurisdiction to review the action of the legislative function the facts which lie within the knowledge of the agency must be disclosed in the record so that the record is complete and adequate for a judicial review to determine whether the action was arbitrary, capricious or discriminatory. *See Goldsmith v. Board of Tax Appeals* (1926), 270 U.S. 117, 46 Sup. Ct. 215, 70 L.Ed. 494. A legislative type of hearing does not include necessarily the right to cross-examine or require testimony to be given under oath."

The court also held that the licensing body has the same discretion in respect to renewals as it has with respect to granting original licenses, citing *State ex rel. Boroo v. Town Board* (1960), 10 Wis. 2d 153, 102 N.W. 2d 238.

The Wisconsin Supreme Court has repeatedly held that the licensing authority has wide discretion to deny licenses subject to court review as to the question of the refusal being arbitrary, capricious and discriminatory. This discretion has been interpreted to be in addition to specific statutory requirements such as age, good moral character, citizenship, and law violators as provided by sec. 176.05 (9), Wis. Stats., and has included the discretion to refuse to license a tavern in a specific neighborhood, *State ex rel. Higgins v. Racine* (1936), 220 Wis. 107, 264 N.W. 490; refusal

to grant a license based on the number of taverns already in a given area, *Rawn v. City of Superior* (1943), 242 Wis. 632, 9 N.W. 2d 87; and refusal to renew a license where the applicant had failed to reveal a felony conviction in another state on his original application, *State ex rel. Boroo v. Town Board,* supra.

There would seem to be no question that each licensing municipality could decide not to have any licensed fermented malt beverage and intoxicating liquor establishments within municipal boundaries. Would such action raise due process questions concerning the licensee's protected interests in the licenses? We think not. See 48 C.J.S., *Intoxicating Liquors,* §64. Even the lower court seems to concede that any protected interests could be wiped out by the legislative body without a due process hearing. (See Note 26, Jurisdictional Statement, A. 128). It would seem, therefore, that the appellees would have greater standing to raise equal protection issues rather than due process issues. Such an attack would also be fatal because it is conceded that the cities of Racine and Kenosha applied uniform legislative policy to all licensees who featured nude dancing in their establishments and decided not to license those establishments any further.

It must be concluded, therefore, that there are no protected interests within the meaning of the due process clause of the Fourteenth Amendment in a combination fermented malt beverage and intoxicating liquor license under Wisconsin laws after its one-year life.

As in *Roth,* where the University professor's contract expired, here the licensee's contract expires and, although he may have a unilateral expectation of renewal, the state has clearly not given such property interests as are entitled to the protection provided in the due process clause of the Fourteenth Amendment.

II. If There Is An Identifiable Protected Interest In Securing An Original License Or A Renewal License, The Legislative-Type Hearing Coupled With Court Review Is "Meaningful" And "Appropriate To The Nature Of The Case."

A. What process is due?

If it is determined that due process applies to the denial of the renewal or the original application for fermented malt beverage and intoxicating liquor license, there still remains the question as to what process is due.

As this court said recently in *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484, at 92 S.Ct. 2600:

> "* * *It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action.' Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed. 2d 1230 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure."

In *Hannah v. Larche* (1960), 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed. 2d 1307, at 80 S.Ct. 1515, this court instructed as follows:

> "* * * Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.* * *"

The real question is what is *fair play* in a given situation. As Mr. Justice Frankfurter said in *Snyder v. Massachusetts* (1934), 291 U.S. 97, 116-117, 54 S.Ct. 330, 78 L.Ed. 674:

> "* * * Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' * * *"

Consideration must be given to the nature of the identifiable interest, the nature of the proceeding and the possible burden on that proceeding as stated in *Larche*. In *Brewer* the court called for a determination of the precise nature of the *governmental function* involved and a weighing of that interest against the *private interest* that is being affected by governmental action.

If, for the sake of argument, we concede an identifiable private interest, it must be in the nature of the "equities" in favor of granting of a renewal license as recognized by the Wisconsin Supreme Court in *Ruffalo,* supra, 157 N.W. 2d 571:

> "* * * Of course, normally in a renewal situation there are more equities in favor of granting the license and the complete disregard of them goes to the question of the refusal being arbitrary, capricious and discriminatory. * * *"

The governmental interest has been repeatedly recognized by this court as being even "* * * more than the normal state authority over public health, welfare and morals." *LaRue,* 93 S.Ct. 395. Thus, the state or any of its municipalities operating under *local option* may determine whether to grant any licenses to sell beer or liquor, sec. 66.054 (5) (c) 1 and sec. 176.38, Wis. Stats.; a municipality may restrict the number of licenses it will authorize, either by ordinance or resolution, *Bjordal v. Town Board* (1939), 230 Wis. 543, 547, 284 N.W. 534; denial may be made of request to transfer license to another area of the municipality, thus increasing police patrol problems, *State ex rel. Edge v. Meyer* (1946), 249 Wis. 154, 23 N.W. 2d 599; a partnership may not be licensed in the name of one partner with the other partner remaining silent or unidentified, *Brill v. Salzwedel* (1940), 235 Wis. 551, 292 N.W. 908, *Sponholz v. Meyer* (1955), 270 Wis. 288, 70 N.W. 2d 619; a license must be refused for premises within 300 feet of a school, hospital or church, sec. 176.05 (9m), Wis. Stats.; state law limits each municipality in the maximum number of licenses to "one license for each 500 population or fraction thereof," sec. 176.05 (21) (b) 1, Wis. Stats.; "A municipality has authority to regulate the operation of taverns in a reasonable manner. This

is implicit in the obligation resting on city authorities to protect the public safety and promote public welfare. The city council is to determine who may be proper persons to operate a tavern, and also the feasibility, with relation to public welfare, of locations in which such business may be carried on * * *". *State ex rel. Higgins v. Racine* (1936), 220 Wis. 107, 264 N.W. 490.

> "* * * It is widely if not universally recognized that intoxicating liquor businesses of all kinds are potentially if not actually dangerous or harmful to the public health, morality and welfare, and that consequently they are subject to strict supervision or prohibition by states and also by municipalities authorized to act in the matter. * * *" 9 McQuillin, *Municipal Corporations*, 483, §26.186.

This court, in *Crowley v. Christensen*, supra, clearly stated the governmental interest, 137 U.S. at 91:

> "* * * By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons

may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. * * *"

To obtain a license for the retail dispensing of fermented malt beverages and intoxicating liquors in the State of Wisconsin, the burden is continuously upon the applicant to show his qualification and to convince the licensing authority of the wisdom of his being licensed from the time he files an application and pays for the printing of the notice in the local paper which notifies the community of his intention to seek licensure by the local licensing body as is required by sec. 176.09, Wis. Stats. Under the scheme of licensing adopted by the State of Wisconsin, the town boards, village boards, and city councils of the various municipalities perform the liquor-licensing function sitting as a legislative body. Sitting as a legislative body, they listen to the opinions and positions of the residents of the community who may be affected by their legislative decisions. In the scheme of things, the people of the State of Wisconsin have decided that this

method of local liquor and beer licensing gives better protection against the evils of the liquor traffic. This principle applies to the cities of Kenosha and Racine as well as to the various towns and villages in the rural and sparsely populated areas of the State of Wisconsin.

The legislative-type hearing provides the municipal officials with an opportunity to consider the objections of anybody in the community to the licensing of a particular person, location, or type of liquor or beer operation. In the instant cases, the only issue was whether the communities involved wanted to license liquor establishments where nude dancing was being and would be performed. In their amended complaints the tavern operators claimed rights to promote nude dancing entertainment under the First and Fourteenth Amendments (A. 10-11). It has never been denied and is included in a stipulation filed prior to the summary judgment determination that the tavern operators featured live entertainment in the form of nude female professional dancers (A. 32). Therefore, there was no issue as to whether or not a complained-of conduct was being carried on by the applicants and, therefore, the question was whether the cities of Kenosha and Racine wanted to continue to license establishments which featured nude entertainment.

Under sec. 176.05 (8), Stats., a licensing body is required to state reasons for the rejection of a renewal application. The three-judge court stated the reason as follows:

> "Subsequent to these hearings, the license committee met and voted to recommend denial of plaintiffs' renewal license applications because of both the nude dancing entertainment provided by the applicants in their taverns and because of the negative effects this form of entertainment allegedly had on the community. * * *" 346 F. Supp. 46.

Can it be denied that there was fair play where the legislative-type hearing was afforded and in the discretion of the licensing body it was decided not to license establishments for the sale of beer and intoxicating liquor where such establishments feature nude dancing? Not to be forgotten is that local legislative bodies are inappropriate to conduct judicial-type hearings for liquor license applicants. First, obviously, many small towns and villages would be ill-equipped to handle such a proceeding without hiring hearing examiners and attorneys to handle the proceeding. Second, in cities where a city attorney could guide the proceeding, the legislative body would be engaging in a "mixing of functions" which has been criticized by many courts as possibly denying due process rights where one person or body is the complainant, prosecutor, judge, and jury. See *Amos Treat & Co. v. Securities and Exchange Commission* (D.C. Cir., 1962), 306 F. 2d 260.

In weighing the relative interests as set out in *Larche* and *Brewer*, it must be concluded that the legislative-type hearing is sufficient to protect whatever "equities" an applicant for a renewal license may have where the action of the licensing body can be reviewed in a judicial proceeding.

This conclusion is inescapable in the instant case because the record clearly indicates that the three bars in the City of Racine and the six bars in the City of Kenosha were denied their licenses because they permitted nude dancing. It is true that both licensing bodies concluded that nude dancing attracted undesirables to the city and caused the city other moral problems, but those issues go to the reasons for not wanting nude dancing, whereas the nude dancing directly supports the discretionary act of refusal to license those establishments. Although not necessary to justify the refusal to license, it is interesting to note that supporting affidavits filed with the motion to modify the

temporary restraining order entered July 2, 1971, certainly support the licensing authorities' conclusions concerning the moral problems created by nude dancing in taverns. (A. 61-72).

In further weighing the private interest against the governmental function, it must be concluded that the minimum requirements for a hearing on the renewal of a liquor license do not require a full judicial-type hearing at the stage of consideration by the city council, village board, or town board.

B. Subsequent court remedies are adequate.

The mere fact that we have contended that a legislative-type hearing before a licensing body of a municipality need not be converted to a quasi-judicial type hearing to comport with due process does not mean that we feel the remedies available to an applicant should end with the licensing body.

If due process requirements can be imposed because of an identifiable protected interest in property, then the judicial inquiry can be postponed within constitutional limitations, as the Wisconsin Supreme Court has provided in *Ruffalo*, 38 Wis. 2d 525, 157 N.W. 2d 571:

> "* * * The reviewing court cannot substitute its judgment for the legal discretion of the Common Council on the merits of the application or review the adequacy of the grounds for its decision other than in the context of determining whether the action of the licensing authority was arbitrary, capricious or discriminatory. * * *"

This court has long recognized: "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability

is adequate. Springer v. United States, 102 U.S. 586, 593, 26 L.Ed. 253; Scottish Union & National Insurance Co. v. Bowland, 196 U.S. 611, 631, 25 S.Ct. 345, 49 L.Ed. 619. * * *" *Phillips v. Commissioner of Internal Revenue* (1931), 283 U.S. 589, 596-597, 51 S.Ct. 608, 75 L.Ed. 1289.

In *Roth,* supra, the court made it clear that where a protected interest is implicated, the right to some kind of a prior hearing is paramount, but that valid governmental interest will justify postponing such a hearing until after the event. To the same effect, *Boddie v. Connecticut* (1971), 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed. 2d 113.

Here, not only is a legislative-type hearing afforded, but adequate legal safeguards are provided by court review. The governmental interest, of course, is the local control of the liquor traffic. The court, in *Lewis v. City of Grand Rapids,* supra, recognized these interests in the importance of local liquor control, 356 F. 2d at 286:

> "* * * The traiditional municipal interests in regulating the liquor business, together with the problems of conducting this regulation through competent, civic-minded, part-time officials, require the use of flexible procedures. * * *"

The judicial remedies developed by court decisions in the State of Wisconsin are more than adequate to protect any identifiable interest, including rights under the due process clause. On review by certiorari the court could remand to the licensing body if factual issues have not been determined by that body. The court can also determine whether errors of law were committed by the licensing board, including due process questions under state and federal constitutions. *State ex rel. Wasilewski v. Bd. School Directors* (1961), 14 Wis. 2d 243, 111 N.W. 2d 198.

In the instant cases, of course, the record is clear that there are no factual issues involved. The complaints in the federal district court allege that the plaintiffs featured nude dancing in their places of business and further allege that the cities denied the licenses because of such conduct which they claim was protected under the First Amendment. (A. 10-11). Accordingly, since there could be no facts at issue in the instant cases, no due process rights were abridged by not providing a judicial-type hearing.

Had the appellees herein felt that the determination of factual issues was at stake, they could have availed themselves of the provisions of sec. 66.054 (14), Wis. Stats., which is a full trial procedure, the same as civil actions instituted in court, which may be instituted "* * * by an applicant, licensee or any citizen of such city, town or village." Although this procedure applies only to the fermented malt beverage license, each appellee was such an applicant, and the determination of the court as to the factual issues surrounding the eligibility of an applicant for a beer license would be binding upon the licensing body in regard to the application for an intoxicating liquor license since the eligibility for licensure under the intoxicating liquor statute is dependent upon the applicant having been issued a fermented malt beverage license.

Although the statute refers to "granting or revocation of any license" it must be construed to include the denial of a license to any applicant. See *Vieau v. Common Council* (1940), 235 Wis. 122, 292 N.W. 297, where an action was brought in county court to review the denial of an operator's license under the predecessor statute, sec. 66.05 (10) (l), 1945 Wis. Stats.; although it was held in *Smith v. Whitewater* (1947), 251 Wis. 306, 29 N.W. 33, that the statute did not apply to the common council's refusal to *transfer* a license.

Finally, in weighing the present Wisconsin scheme for regulation of liquor against an identifiable protected interest of the applicant, it must be remembered that the cost of providing contested hearings at the local town or village level might be so great as to discourage any denials of liquor applicants. Were this to result, a new system of licensing would have to be devised, probably involving the state in every local liquor and beer application. Thus, the local control felt so desirable and which has proved efficient in the control of the liquor traffic would disappear. This appears to be too great a price to pay where no showing has been made that any applicant for a beer or liquor license, either in this case or in any other case, has been denied a license because of the erroneous, arbitrary, capricious, or discriminatory refusals by a licensing body in this state. The Wisconsin scheme does provide for a hearing that is "meaningful," *Armstrong v. Manzo* (1965), 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed. 2d 62, 66, and "appropriate to the nature of the case," *Mullane v. Central Hanover Bank & Trust Co.* (1949), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and *Bell v. Burson* (1971), 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90.

The Wisconsin scheme for the licensing of liquor dealers is not entirely different from the federal government's regulation of alcohol dealers during prohibition. There, on court review of the denial of a renewal permit, the court was limited to determining whether the administrator made his decision "upon error of law, was wholly unsupported by evidence, or was clearly arbitrary or capricious." *Quitt v. Stone* (4th Cir., 1931), 46 F. 2d 405, cert. den. 283 U.S. 839, 51 S.Ct. 487, 75 L.Ed. 1450. See also *Ma-King Products Co. v. Blair* (1926), 271 U.S. 479, 46 S.Ct. 544, 70 L.Ed. 1046; *Silberschein v. United States* (1924), 266 U.S. 221, 45 S.Ct.

69, 69 L.Ed. 256; *Herbert v. Anstine* (4th Cir., 1930), 37 F. 2d 552; *Blair v. Graupner* (3d Cir., 1928), 29 F. 2d 815; *Yudelson v. Andrews* (3d Cir., 1928), 25 F. 2d 80; and *Stein v. Andrews* (3d Cir., 1928), 25 F. 2d 281, 282.

III. The Court Below Should Have Abstained.

The Three-judge Court Act was not designed to be a grant of power to federal judges to arbitrarily interfere with a state regulatory scheme. Rather, the history of the Act clearly establishes that it was passed as a compromise to limit the power of lower federal court judges to interfere with the operation of state statutes. It has been said that it's purpose was to prevent the "improvident statewide doom" by a federal court of a state legislative policy.

As Justice Frankfurter said in *Phillips v. United States* (1941), 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800, at 61 S.Ct. 483:

> "* * * The history of §266 * * * the narrowness of its original scope, the piece-meal explicit amendments which were made to it * * *, the close construction given the section in obedience to Congressional policy * * *, combine to reveal §266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."

As Judge Reynolds has indicated in his opinion of October 21, 1971 (Jurisdictional Statement, A. 106), the temporary restraining order directing the issuance of liquor licenses on June 30, 1971, was issued despite the fact that the plaintiffs had not requested in their pleadings the convening of a three-judge district court or the entering of an interlocutory injunction. Judge Reynolds requested the three-judge

court on his own motion several weeks after he had issued the temporary restraining order directing the municipalities to issue liquor licenses.

It is submitted that this court should determine whether the abstention principles stated in *Burford v. Sun Oil Co.* (1943), 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (Texas oil production control scheme), and *Alabama Public Service Commission v. Southern Railway Company* (1950), 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (Alabama utility regulation scheme), which indicate that a federal court should abstain when its action would interfere with policies having state-wide significance and importance, should not have been applied by the district judge. Abstention is proper in a civil rights case. *Harrison v. N.A.A.C.P.* (1959), 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed. 2d 1152.

In the *Burford*-type abstention the federal court defers to avoid interference with state activities, and dismissal of the action is appropriate.

It would seem that the abstention doctrine should not be blithely ignored by either courts or litigants since an imaginative plaintiff can nearly always find a deprivation of some alleged federal right by virtually every type of state administrative action. It may be seriously doubted if it was ever the intent of Congress to give to the federal courts the responsibility to vindicate *alleged* federal rights to the exclusion of the state courts.

On January 26, 1973, the Court of Appeals for the Fourth Circuit decided in *Lynch v. Snepp,* 41 L.W. 2401, that the principles of comity, equity and federalism preclude a federal district court from enjoining state court action threatening alleged First Amendment rights, applying the *Younger* doctrine. *Younger v. Harris* (1971), 401 U.S. 37, 91

S.Ct. 746, 27 L.Ed. 2d 669. The court reasoned that even though federal courts have the power under the Civil Rights Act to enjoin state proceedings, such power should not be used to upset federalism and centralize power.

The abstention principle is especially applicable to the appellee Go-Go of Racine, Inc., because a civil action involving these issues was pending in the circuit court of Racine County at the time of Judge Reynolds' original exercise of jurisdiction. *Go-Go of Racine, Inc. et al. v. City of Racine et al.*, Racine County Circuit Court No. 71-368-C1 and No. 71-295-C1.

Mr. Justice White in his dissenting opinion in *Lynch v. Household Finance Corp.* (1972), 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed. 2d 424, indicated that *Younger* and companion cases support the view that the federal court's equitable powers should not be used to frustrate or interfere with the operation of state courts by adjudicating federal questions which can be adjudicated in state courts and this principle is applicable where state civil litigation is in progress.

The second cause of action in the amended complaint (as in the original) contended that the plaintiffs had a First Amendment right to feature nude dancing (A. 10-11). The Wisconsin courts have never considered and decided that issue.

The instant case of federal intervention with the policies of the State of Wisconsin in regard to liquor and beer licensing is especially disconcerting when it is considered that the retail liquor establishments in the cities of Racine and Kenosha operated by the appellees herein are actually operating under a license created by a temporary restraining order and later an injunctive judgment of the United States District Court for the Eastern District of Wisconsin. The licenses which hang on the walls in the City of Racine

take the form of a blank application not signed by the city officials but with the federal court order attached thereto and providing the authority for operation.

So far-reaching are the terms of the judgment enjoining the cities of Racine and Kenosha that they may not deny any application for the renewal of a liquor license so long as the Wisconsin Statutes do not provide for a judicial-type hearing before the city council. Thus it must be construed that even if the city council granted a judicial-type hearing, since the statutes have not been changed, no denial could be made, even on justifiable grounds.

Is not the court-ordered granting of liquor licenses and the broad injunctive order blocking denial of any application for a renewal in direct contradiction of sec. 2 of the Twenty-first Amendment to the United States Constitution? If the federal courts can force issuance of a liquor license in violation of a state's laws, can this include the court-ordered issuance of a license where the municipality has reduced the quota? Can the federal court direct the issuance of a renewal liquor license where the municipality has decided to issue only beer licenses?

It would seem that the court should adopt Mr. Justice White's position in *Lynch v. Household Finance Corp.*, supra, that the *Younger* doctrine should bar the federal court's equitable powers from frustrating and interfering with the operation of state courts adjudicating federal questions which can be adjudicated in state courts where, as here, a civil action was pending in the state courts at the time of the exercise of federal jurisdiction and the state scheme for liquor control is under attack.

CONCLUSION

The renewal of a fermented malt beverage and intoxicating liquor license under Wisconsin laws does not involve liberty or property under the due process clause of the Fourteenth Amendment. If any such protected interest can be identified, a legislative-type hearing before a municipal legislative body with subsequent court review is meaningful and appropriate to the nature of the case. The lower court should have abstained where the state liquor control scheme was under attack and the issue of nude dancing in taverns had not been decided by the Wisconsin courts. Therefore, appellants respectfully urge that the judgment of the United States District Court for the Eastern District of Wisconsin be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, a member of the Bar of this Court, do hereby certify that on February 26, 1973, I duly mailed three copies of the Brief of Appellants to each of the attorneys for the appellees, addressed as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-658

CITY OF KENOSHA,
A Wisconsin Municipal Corporation;
CITY OF RACINE,
A Wisconsin Municipal Corporation;
ROBERT W. WARREN,
Attorney General of the State of Wisconsin,
Intervening Defendant;

Appellants,

v.

PETER G. BRUNO;	No. 71-C-330
BRUCE BLEASHKA;	No. 71-C-331
SLEEPY'S, INC.;	No. 71-C-332
FRED KAUZRICH;	No. 71-C-333
JEANETTE STENZEL;	No. 71-C-334
CHARLES WIGINTON;	No. 71-C-352
RICHARD A. MISURELLI and TERRANCE MC CUE;	No. 71-C-316
GO-GO OF RACINE, INC., A Wisconsin Corporation, THEODORE F. WITHERIL, and JEROME J. RUETZ, JR.; and	No. 71-C-317
DAVID H. ROBERS;	No. 71-C-335

Appellees.

On Appeal From the United States District Court for the Eastern District of Wisconsin

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BRIEF OF APPELLEES SLEEPY'S, INC., KAUZRICH and WIGINTON

STATUTES INVOLVED

280.09 Bawdyhouses declared nuisances. Whoever shall erect, establish, continue, maintain, use, occupy or lease any building or part of building, erection or place to be used for the purpose of lewdness, assignation or prostitution, or permit the same to be used, in the state of Wisconsin, shall be guilty of a nuisance and the building, erection, or place, in or upon which such lewdness, assignation or prostitution is conducted, permitted, carried on, continued or exists, and the furniture, fixtures, musical instruments and contents used therewith for the same purpose are declared a nuisance, and shall be enjoined and abated.

280.10 Disorderly house, action for abatement. Whenever a nuisance, as defined in s. 280.09, exists the district attorney or any citizen of the county may maintain an action in the circuit or county court in the name of the state to abate the nuisance and to perpetually enjoin every person guilty thereof from continuing, maintaining or permitting such nuisance. All temporary injunctions issued in such actions begun by district attorneys shall be issued without requiring the undertaking specified in s. 268.06, and in actions instituted by citizens it shall be discretionary with the court or presiding judge to issue them without such undertaking. . . .

* * *

944.20 Lewd and Lascivious behavior. Whoever does any of the following may be fined not more than $500 or imprisoned not more than one year in county jail or both:

(1) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(2) Publicly and indecently exposes a sex organ.

944.21 Lewd, obscene or indecent matter, pictures and performances. (1) Whoever intentionally does any of

the following may be fined not more than $5,000 or imprisoned not more than 5 years or both:

(d) Advertises, produces or performs in any lewd, obscene or indecent performance.

* * *

947.01 Disorderly conduct. Whoever does any of the following may be fined not more than $200 or imprisoned not more than 90 days or both:

(1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance; . . . .

STATEMENT OF THE CASE

Appellees are licened tavernkeepers. They own and operate taverns which are licensed by the City of Kenosha, Wisconsin to sell intoxicating liquors. (R. 201)[1] Each tavernkeeper has an investment in excess of $20,000 in his business. (R. 207) Termination of their liquor licenses would deprive each operator of the authority to sell intoxicating liquors for consumption on the premises by the glass, and would result in a major loss of income. (R. 207-208)

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[1] This is an appeal by the State of Wisconsin from the judgments in nine separate cases before the United States District Court for the Eastern District of Wisconsin. The State of Wisconsin filed a notice of appeal to this Court in each of the nine cases. However, only the records in two of the cases (*Misurelli, et al. v. City of Racine,* No. 71-C-316 and *Sleepy's, Inc. v. City of Kenosha,* No. 71-C-332) were transmitted to the Clerk of this Court. The records in the other seven cases are virtually the same in content as the record now on file.

This brief is submitted on behalf of appellees, Sleepy's, Inc., Fred Kauzrich and Charles Wiginton. Therefore, this Statement of the Case relates only to the procedures used by the City of Kenosha. Again, however, the disputes with the City of Kenosha are based upon essentially the same facts found in the cases involving the City of Racine and the Racine appellees. The references to the record in this brief will be confined to the cases involving the City of Kenosha unless otherwise noted.

Appellees had been licensed individually by the City of Kenosha under "Retail Class B" licenses to sell liquor (other than beer or malt beverages) from July 1, 1970 through June 30, 1971. (R. 202)[2] During this license period each of the Kenosha tavernkeepers featured female professional dancers for the entertainment of their patrons. The dancers often presented performances featuring nude or semi-nude dancing. (R. 207)[3]

Prior to April 15, 1971, as required by state law, the tavernkeepers submitted appropriate applications to renew their "Retail Class B" liquor licenses for the time period July 1, 1971 to June 30, 1972. The City of Kenosha stipulated that the applications revealed no legal disabilities which would prevent the tavernkeepers from holding such licenses.[4] (R. 202)

Finance Committee Meetings

During the week of May 10, 1971 each of the tavernkeepers received a notice specifying the time and place of a special meeting of the city finance committee (re-

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[2] A separate license must be obtained to sell beer or other fermented malt beverages. §§176.05(10)(b) and 66.054, Wis. Stats. (1971).

[3] At no time during these license disputes had the City of Kenosha alleged, nor had any court found, that these dancers had performed in an obscene performance (§944.21[1][b], Wis. Stats. [1971]), or in a lewd and lascivious manner (§944.20[2], Wis. Stats. [1971]). (R. 207)

[4] §176.04(9), Wis. Stats. (1971) provides in pertinent part: "WHERE AND TO WHOM LICENSES NOT GRANTED. No license or permit shall be granted to any person or persons under the age of 18 years for the sale of any such intoxicating liquors, or to any person who is not of good moral character and a full citizen of the United States and of this State and who has not resided in this State continuously for at least one year prior to the date of filing the application; nor shall any such license be granted or issued to any person who has habitually been a petty law offender, or has been convicted of an offense against the laws of the State punishable by imprisonment in the State prison. . . ."

ferred to in the notice as the "license committee"). The notice simply stated that the "committee wishes to *interview* you regarding the license for which you have applied." [Emphasis supplied.] (R. 202) The notice did not state that the committee had received complaints about the operation of the taverns; nor did it state that a hearing would be conducted to air such complaints; nor did it state that the purpose of the meeting would be to formulate recommendations on the applications to be submitted to the Kenosha Common Council.

On May 18, 1971 (the date specified in the notice), the committee, composed of six city councilmen, convened. No interview of any of the tavernkeepers ever took place. (R. 203) Instead, the committee heard from citizens who spoke against renewal of the liquor licenses for those taverns where nude and semi-nude dancing had been featured. Six applicants (appellees Bruno, Bleashka, Sleepy's, Inc., Kauzrich, Stenzel and Wiginton) were separated out from a total of 154 license applicants and their applications were discussed as a group, rather than individually. (R. 203, 280) None of the comments of the speakers was made under oath. No speaker was allowed to be cross-examined. Some of the speakers complained of events which they had not witnessed but which they had heard about from other persons. An attorney for the six applicants was present and was permitted to speak. He did not ask to cross-examine any of the speakers. No record was made of the statements or of the nature of the complaints. (R. 203, 209) At the conclusion of the meeting the attorney agreed on behalf of the tavernkeepers to meet privately on May 21, 1971 with the chief of police, the city attorney of Kenosha and the finance committee to discuss the legal rights and duties of the committee and to reach a compromise agreement

which would permit the committee to recommend renewal of the licenses. (R. 278)

On May 19 the attorney for the tavernkeepers was informed that the meeting would be public, rather than private. On May 21 the finance committee reconvened and the chairman announced that the purpose of the meeting was to hear statements from citizens on the six tavernkeepers' applications for renewed licenses. The mayor of the City of Kenosha gave an address which was followed by a brief statement by the attorney for the tavernkeepers. The applicants and their attorney then left the meeting. (R. 204) Thereafter, the finance committee voted to recommend to the common council that all six license applications be denied. (R. 205) At no time prior to the May 21 meeting were the applicants or their attorney told that complaints would be heard concerning their applications; nor were they told the nature of the complaints (R. 280); nor were they given prior notice that a vote would be taken at the May 21 meeting on their applications. (R. 204) Again, no record was compiled of the statements made at the hearing. (R. 210)

Common Council Meetings

On June 7, 1971 the Kenosha Common Council heard the recommendations of the finance committee regarding the applications of the six tavernkeepers. No specification of the reasons for the committee's recommendations was given to the tavernkeepers or their attorney prior to the council meeting. (R. 280) The chairman of the finance committee and one other member of the committee reported its recommendations and moved to deny the renewal of the licenses of the six tavernkeepers. The committee's recommendations as to each applicant were based

on the following reasons which were reported to the council:

"1. The licensee, through his actions in general in operating his establishment has defiled the reputation of the City of Kenosha areawise, statewise [*sic*] and nationally.

"2. This person helped furnish an atmosphere conducive to the flourishing of prostitution, creating a bad environment and setting improper moral standards for the children in this community.

"3. Since the inception of the type of entertainment allowed by the licensee, the law enforcement problem has increased and the Police Department records indicate that parking and litter problems around the area and crimes of a violent nature escalated in areas of our city.

"4. The Chief of Police, head of the City's Police Department, recommends denial based on the fact that topless and bottomless entertainment as featured in the licensee's establishment is conducive to the lack of respect for law and authority as it relates to our community.

"5. Increased police surveillance of establishments of this type requires more man hours and thus proves costly to the taxpayers of the city.

"6. The type of entertainment conducted by the licensee promotes the 'wide open city' effect and is not attractive to new industry who may consider coming into the community.

"7. Entertainment, which has been allowed in this establishment, attracts an undesirable element from other cities who come to view the same." (R. 211-212)[5]

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[5] The reasons cited by the finance committee to the council for denying the applications are surprisingly similar to the reasons cited by the Racine license committee in its report and recommendation to the Racine common council. Compare (R. 211) with (A. 35-36).

Prior to voting on the committee's recommendations the council suspended its rules to hear statements from persons other than council members. There were statements by the attorney for the applicants, by the chief of police and by three private citizens.[6] The common council then proceeded to vote on the applications, and in each instance denied the application to renew the tavernkeeper's liquor license. As required by §176.05(8), Wis. Stats. (1971), the council stated its reasons for rejecting the application in each instance. In each case the council based its action on the seven reasons articulated by the finance committee in its report. (R. 211-212)

On June 21, 1971 the common council held another meeting. It decided to reconsider the action taken on June 7, in light of a signed agreement by the tavernkeepers that (1) there would be no more topless, bottomless dancing; (2) female entertainers would wear bottoms and tops when on licensed premises; (3) there would be no nude male entertainers; and (4) the injunction pending in federal court would be dismissed upon enactment of a new cabaret ordinance. (R. 213) The council again suspended its procedures to hear statements from non-

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[6] The minutes of the clerk reflect that the attorney made the following statement:

> "Attorney Schwartz concluded his statement stating that his 6 clients feel they have done no wrong — that his 6 would throw in the towel and agree, in order to continue in business, to clothe the go-go dancers, and upon city passing a new cabaret ordinance would dismiss action pending in Federal Court temporarily enjoining the city."

The minutes further reflect the following statements::

> "Police Chief, Robert L. Bosman, was then called upon to make a statement. He was for denial, stating that denial would be for the common good of the community. That this type of tavern has affected the neighbors and their living conditions, fights in the

council members. Eight persons were heard, three in favor of denying the licenses and five in opposition. Again, there is no record of the content of the statments. The mayor of Kenosha then took the floor and stated that if the licenses were reinstated, he would veto the council's action. (R. 213) The council then voted and reaffirmed the denial of the six applications.

The tavernkeepers then brought this action in federal district court on June 30, 1971, alleging that they were denied due process of law due to a lack of notice and hearing prior to the city's action, that the statutes and procedures were overly vague, and that the acts of the city deprived the tavernkeepers of their rights of free speech and expression. A temporary restraining order was entered on June 30, 1971, which required that the licenses be reinstated until further order of the court. (R. 144) The restraining order was subsequently continued, and the single judge requested the convening of a three-judge court in light of the challenge to the state

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(continued)

neighborhood, cans and litter strewn about, young children have been seen viewing the entertainment through windows and cracks in doors.

. . .

"Mr. John O'Day repeated the request of the Knights of Columbus as set forth in their petition.

"Mr. Richard Bisciglia . . ., spoke on the issue stating that he lives close to taverns in question. His neighborhood has degenerated since the inception of topless and bottomless entertainment due to litter, fights, filthy language. He recalled an incident that on June 6, 1971, men from Illinois went into one of the taverns, came out about one half hour later and one exposed himself in broad daylight on a public street, while using filthy language. At night, both he, his wife and children have to listen to the obscene language used by patrons.

"Sandra O'Day stated that she feels this type of entertainment affects children.

"After the public hearing was ended, members of council expressed their individual feelings on the issue." (R. 211)

statute regulating liquor licenses. *Bruno v. City of Kenosha,* 333 F. Supp. 726 (E.D. Wis. 1971), *et seq.* The facts were agreed upon by the parties following requests for admissions and both sides filed motions for summary judgment. Thereafter, on August 2, 1972 a three-judge court entered its decision which is the subject of this appeal. *Misurelli v. City of Racine,* 346 F. Supp. 43 (E.D. Wis. 1972). The decisions concerning the Kenosha tavernkeepers are unreported but merely incorporate by reference the reported decision in *Misurelli.* (Jurisdictional Statement, A. 129-130).

SUMMARY OF ARGUMENT

The Wisconsin statutes which regulate the issuance of municipal, retail liquor licenses require that tavernkeepers renew their licenses annually. Under the statutory procedures a tavernkeeper must submit an application to renew his license to local municipal authorities before April 15 of each year, and the authorities must grant or deny his application by June 15. By statute, any renewal applicant whose application is denied must be informed of the reasons therefor. The law as construed by the Wisconsin Supreme Court entitles each applicant to a legislative-type hearing before his application is considered. The municipality is required to give applicants notice of the meetings at which the applications will be determined and also is required to grant each applicant an opportunity to speak in support of his application. However, the law, as construed, does not require prior notice of the reasons why the license may be denied so the applicant can prepare a defense, and does not afford the applicant an adversary hearing where witnesses can be sworn, confronted and cross-examined and a verbatim record is prepared.

Appellees are tavernkeepers whose liquor licenses were not renewed because they featured performances by nude and semi-nude dancers. According to city officials, these entertainment programs harmed the city's reputation, encouraged prostitution, set poor moral standards for children, caused litter and parking problems, escalated crimes of violence, discouraged new industry, and attracted undesirable persons. The tavernkeepers never were given advance notice that these were the reasons why the city proposed to deny their applications. The appellees were denied the opportunity to cross-examine the persons making these accusations. None of the statements by witnesses at such license meetings was made under oath and no verbatim record was made of their statements.

The acts of the city deprived the tavernkeepers of "liberty" and "property" within the meaning of the due process clause so that constitutional protections of procedural due process were applicable. Because the licensees were publicly accused of immoral and criminal-type conduct, they had a strong interest in refuting the charges. Their "liberty" had been restricted because their reputations in the community were impugned. Also, the nonrenewal of their licenses on grounds of bad moral character foreclosed similar tavernkeeping opportunities to them elsewhere in the State. Appellees were also deprived of "property" because applicants for renewed liquor licenses are protected by many procedures which do not protect initial applicants. A licensee seeking renewal has a right to stated reasons if his application is denied; and he has greater rights of review over any nonrenewal decision. Moreover, the interest of each appellee in renewing his liquor license constitutes "property" because of his investment of over $20,000 in his business property.

Because "liberty" and "property" were affected by the non-renewal decisions, procedural due process should have been afforded each licensee. The tavernkeepers' interests in defending their reputations, in protecting their property investments, in pursuing their chosen careers, and in presenting entertainment which is protected under the First Amendment, far outweighed the interests of the State (such as increased costs and inconvenience) in providing only a summary, non-adversary adjudication of their applications. Further, the State has an interest in ascertaining the truth concerning the character of the applicants and the nature of their tavern businesses so that persons of good standing are granted liquor licenses. The public has an interest in full public hearings so that corruption does not infect municipal governments in the dispensation of license privileges.

The hearings which were held failed to offer the tavernkeepers "minimal procedural safeguards." Only if they had been given advance notice of the charges against them could they have adequately defended themselves and their licenses. Because witnesses were not under oath and were not subjected to cross-examination, all sorts of vague and unsupported charges were made. The licensees were entitled to a full hearing *before,* not after, the city officials ruled on their applications. They could not have received an adequate hearing in court on review because such review is not a new hearing on the merits. It only provides a remedy when the discretionary, non-renewal decision is arbitrary or capricious.

The federal court which found the renewal procedures to be constitutionally defective should not have abstained from hearing this dispute. The state statutes which were challenged were unambiguous and had been authorita-

tively construed. Furthermore, no state court actions were pending in these disputes. So the federal court did not in any way interfer with pending state court litigation.

ARGUMENT

I. A TAVERNKEEPER'S INTEREST IN REFUTING OFFICIAL ACCUSATIONS OF IMMORAL OR CRIMINAL CONDUCT AND IN CONTINUING HIS ANNUAL LIQUOR LICENSE CONSTITUTES "LIBERTY" AND "PROPERTY" UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. A Refusal to Renew a Tavernkeeper's Liquor License Because of Official Accusations of Immoral or Criminal Conduct Results in a Deprivation of "Liberty" Within the Meaning of the Due Process Clause of the Fourteenth Amendment.

The tavernkeepers assert that the Kenosha officials violated their right to procedural due process of law when city officials rejected the renewal applications. They recognize that before concepts of due process come into play, they must first demonstrate that their interests affected constitute "liberty" or "property" which is protected under the Fourteenth Amendment. This was the analytic approach announced in *Board of Regents v. Roth,* 408 U.S. 564, 570-571 (1972):

> "But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake

> . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[7] (Emphasis in original.)

The "liberty" of the Kenosha tavernkeepers was substantially impaired by the action of the Kenosha officials in two significant respects. First, the chief of police, the finance committee and the common council all leveled accusations of undesirable, immoral and criminal conduct against the tavernkeepers for their entertainment policies. The charges which were directed against the tavernkeepers were made in public; by their very nature they were calculated to damage the reputation and standing of the tavernkeepers in their own community. Second, the refusal to renew appellees' liquor licenses because they were contributing to undesirable, immoral and criminal conduct in the city, necessarily foreclosed the tavernkeepers from finding other business opportunities elsewhere in the state. After their license renewals were refused for the reasons stated, it would have been virtually impossible for the tavernkeepers to move to another section of the state and readily obtain a liquor license, both because of the statutory "good moral character" requirement and the statutory April 15 time restriction on license applications.

It was a matter of public record that the chief of police recommended rejection of the applications because some of the entertainment in his opinion was "conducive

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[7] *Accord, Morrissey v. Brewer,* 408 U.S. 471, 481 (1972): "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment . . . Once it is determined that due process applies, the question remains what process is due"; *Fuentes v. Shevin,* 407 U.S. 67, 84 (1972): "The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection."

to the lack of respect for law and authority as it relates to our community." (R. 211) At the June 7 common council meeting the police chief further charged that "this type of tavern has affected the neighbors and their living conditions, fights in the neighborhood, cans and litter strewn about, young children have been seen viewing the entertainment through windows and cracks in doors." (R. 211) The license committee in its recommendations to the common council charged that the licensees had "defiled the reputation of the city," that they had furnished "an atmosphere conducive to . . . prostitution . . . setting improper moral standards for the children in this community," that law enforcement problems had increased and that police department records indicate "that parking and litter problems around the area and crimes of a violent nature [have] escalated. . . ." The committee also charged that the entertainment "is not attractive to new industry . . . coming into the community," and that it "attracts an undesirable element from other cities. . . ." (R. 211)

Further, at both finance committee meetings and both common council meetings several private citizens advocated that the license applications be denied. While the nature and content of their statements is unknown because no recording or transcript was prepared, it would not be unfair to assume that they were also accusing the tavernkeepers of improper, immoral or illegal conduct.

The public charges against the tavernkeepers which preceded the denial of their license applications clearly affected the "liberty" of each licensee. In *Board of Regents v. Roth, supra,* at 573, this Court expressly noted that official accusations of dishonesty *or immorality* neces-

sarily infringe on an individual's liberty or freedom under the Fourteenth Amendment.

> "There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.
>
> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case." *Id.*[8]

While this Court found that the nonrenewal of Professor Roth's contract did not implicate a "liberty" under the Fourteenth Amendment, that was because the university had not given, and was not required to give, a reason for the nonrenewal. *Id.* at 567. On the other hand, the Kenosha common council publicly acknowledged its reasons for the nonrenewal of the tavernkeepers' licenses. Moreover, it was required to do so by statute. Section 176.05(8), Wis. Stats. 1971, provides in pertinent part:

> "No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection."

While the licensees did not deny that they frequently offered topless or nude dancing for entertainment, they

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[8] *Accord, Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971): "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential;" *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1952): "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." (Frankfurter, J. concurring).

certainly questioned the official accusations against them that this entertainment defiled the reputation of the city, furnished an atmosphere conducive to prostitution, set improper moral standards for children, increased parking and litter problems, escalated crimes of a violent nature in the city, and attracted undesirable elements from other cities. Though the accusations were noticeably vague and unspecific, nevertheless they exposed the proprietors "to public embarrassment and ridicule." *Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971).

The Kenosha nonrenewal procedures infringed on the licensees' "liberty" in a second way. The nonrenewal decision substantially impaired the freedom of each tavernkeeper to find similar business opportunities elsewhere in the state. Because the Kenosha officials essentially rejected the applications on the ground that the licensees were contributing to undesirable, immoral and criminal activity in the city, the tavernkeepers were branded as persons of bad moral character. If they had moved to other towns or cities in Wisconsin and had sought liquor licenses from those municipalities, they no doubt would have had to confront the State statute which disqualifies persons "not of good moral character" from holding liquor licenses. §176.05(9), Wis. Stats. (1971). In addition, even if another Wisconsin town or city had been willing to ignore Kenosha's labels of immorality and criminality, appellees would have missed the April 15 deadline imposed by the licensing statute for submitting applications. Section 176.05(8), Wis. Stats. (1971), requires the local authority to grant or deny a liquor license application only if it is presented before April 15. While the town or city may grant licenses which are applied for at any other time, an applicant can compel the locality to grant or deny his application only if it is filed before April 15.

In the present situation appellees would have had no assurance that an application for a license from some other Wisconsin municipality would be acted upon until the following year since the Kenosha applications were not denied until June. Thus, if any of the tavernkeepers had moved to another municipality to re-establish a tavern business, he would have faced the prospect of having to wait at least until April of the following year to get his application heard; or, even worse, he might never be entitled to hold a liquor license because the Kenosha officials stigmatized him as a person of bad moral character.[9]

In *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), this Court stated: "Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life. . . ." More recently, in *Board of Regents v. Roth,* 408 U.S. 564, 573-574 (1972), the Court noted that Professor Roth's liberty would have been affected if it had been likely that he had been barred from employment in other state universities.

> "Similarly, there is no suggestion that the State in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not involve any regulations to bar the respondent from all other

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[9] The consequences of nonrenewal when based upon charges of immorality can be as severe as the consequences of the revocation of a liquor license. Under §176.12, Wis. Stat. (1971) if a license is revoked "no other license shall be granted to such person within 12 months of the date of its revocation." Yet a licensee facing revocation is given a full panoply of procedural protections, including prior notice, and a full adversary hearing. §176.12, Wis. Stat. (1971).

public employment in State universities. Had it done so, this, again, would be a different case." *Id.*[10] Appellees submit that theirs clearly is an example of "the different case."

B. A Tavernkeeper's Interest in Continuing His Liquor License is a Form of "Property" Within the Meaning of the Due Process Clause of the Fourteenth Amendment.

It has been asserted that a tavernkeeper's interest in renewing his annual liquor license does not constitute "property" under the due process clause because the license expires automatically, and there is no continuing entitlement beyond the year term. In *State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 523, 157 N.W. 2d 568 (1968), the Wisconsin Supreme Court stated: "And because the license is generally of only one year's duration and must be renewed, it has been considered more in the nature of a privilege than a vested or a property right." This analysis overlooks the fact that Wisconsin offers procedural protections for a tavernkeeper seeking to continue his license which are unavailable to a person making his first application. By statute, a renewal applicant has a right to notice of the reasons why the license was not renewed. §176.05(8), Wis. Stats. (1971). An initial applicant, on the other hand, has no statutory right to be informed of the reasons why his application was denied. The renewal applicant has greater appellate remedies as well: because the reason for the denial of a renewal application is a matter of public record, a review-

[10] *Accord, Cafeteria Workers v. McElroy,* 367 U.S. 886, 898 (1961): "Finally, it is noted that this is not a case where government action is operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity. . . . There is nothing to indicate that this determination would in any way impair Rachel Brawner's employment opportunities anywhere else."

ing court is better able to determine whether the licensing authority has abused its exercise of discretion. If an initial license applicant seeks review of the denial of his application, the reviewing court has no statement of reasons to consider, and thus the licensing authority is left with apparently unfettered discretion. The renewal applicant, on the other hand, has a "more adequate legal remedy." *State ex rel. Boroo v. Town Board,* 10 Wis. 2d 153, 160, 102 N.W. 2d 238 (1960).

> "It seems to us that what the legislature attempted to do by enacting the portion of ch. 42, Laws of 1941, [§176.05(8), Wis. Stats. (1971)] which required the reasons for denial of an application for renewal license to be entered upon the clerk's minutes, was to enable the courts to review such stated reasons and to determine whether the refusal of a license on such grounds constituted an arbitrary or capricous act." *Id.* at 160.

The *Boroo* decision also states that a renewal applicant, if successful on review, can obtain a court order compelling the renewal of his license, while the same court, finding an abuse of discretion in denying an initial license application, can only send the matter back to the licensing authority for further proceedings.

> "If the reviewing court should conclude that the stated reasons did constitute arbitrary or capricious action, and therefore an abuse of discretion, there would exist no reason why the matter should be sent back to the licensing authority to again exercise its discretion. Under such a situation the licensing authority should be held to have exhausted its discretion and the court should direct the issuing of the license unless some other statutory impediment prohibited the same." *Id.* at 160-161.

Thus, contrary to the situation in *Board of Regents v. Roth, supra,* at 578, where Roth's employment contract

"made no provision for renewal whatsoever," a licensed tavernkeeper is protected by statutory provisions and Wisconsin case law governing procedures for renewal. Furthermore, the fact that Wisconsin has eligibility standards under §176.05(9) specifying who may not be granted a liquor license also gives the licensed tavernkeeper a type of "property" interest. In *Board of Regents v. Roth, supra,* at 576, this Court noted that under *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117 (1926), eligibility rules alone may give an applicant a sufficient property interest to invoke procedural protections under the due process clause.

> "[T]he existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied.... [T]he Board's discretionary power 'must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.' "

When a tavernkeeper seeks to renew his liquor license, he has more than just a job or employment at stake. The State has acknowledged that each of the appellees has an investment in his tavern in excess of $20,000. Thus, it was acknowledged in *State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 524, 157 N.W. 2d 568 (1968) that: "Of course, normally in a renewal situation there are more equities in favor of granting the license. . . ." Although appellees may be compared to Professor Roth in that they sought to renew their licenses to continue their employment, they differ from Roth in that no underlying investment was in jeopardy in his situation. For example, if the university had encouraged Roth to make a personal investment in a research project requiring several years' work or, had encouraged him to use

his own funds to purchase or lease a building for a political science institute, then Roth's interest in the renewal of his employment contract would have acquired added "property" characteristics. Where the licensee is encouraged by the State to make a property investment for the exercise of the license privileges, the licensee clearly has justification for asserting a "property" interest in the renewal of the license.

The definite property aspects of licenses which are limited to terms should not be overlooked merely because they expire on a specified date. For example, if medical licenses and lawyers' licenses expired annually, would the State be so quick to suggest that doctors and lawyers did not have a sufficient "property" interest in renewing their licenses as to afford them due process? Or if the State limited welfare eligibility or public housing eligibility on a monthly basis, so that entitlements would have to be renewed every month, would the State then argue that welfare recipients and public housing tenants have an insufficient "property" interest to require notice and hearings prior to non-renewal? The fact that the privilege or license expires, and is not a self-continuing interest, does not detract from its value or "property" aspects.

Finally, this Court's reference in *Goldberg v. Kelly*, 397 U.S. 254, 262 n. 9 (1970) to the decision in *Hornsby v. Allen*, 326 F. 2d 605 (5th Cir. 1964), strongly suggests that a "right to obtain a retail liquor store license" is a form of "property" under the Fourteenth Amendment. For the reference to *Hornsby* was included in an enumeration by the Court of interests which could not be denied without "relevant constitutional restraints." *Id.*

II. DUE PROCESS OF LAW REQUIRES THAT A MUNICIPALITY MAY NOT DENY AN APPLICATION FOR RENEWAL OF A LIQUOR LICENSE UNLESS THE APPLICANT IS GIVEN ADVANCE NOTICE OF THE REASONS WHY HIS APPLICATION MAY BE DENIED AND IS GRANTED AN ADVERSARY HEARING WHERE A VERBATIM RECORD OF SWORN TESTIMONY IS MADE AND WHERE HE MAY CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM.

A. A Tavernkeeper's Interests in Clearing His Name of Charges of Immoral or Criminal Conduct and in Renewing His Liquor License Far Outweigh Any Interest the Municipality May Have in Obtaining a Summary, Non-Adversary Adjudication of His Renewal Application.

The concept of procedural due process of law is a flexible one. Depending upon the various private and governmental interests involved, either greater or lesser procedural safeguards may be required. Not all situations calling for procedural safeguards call for the same kind of procedure. An acknowledged formula for determining what safeguards are required in a given situation was stated in *Cafeteria Workers v. McElroy* 367 U.S. 886, 895 (1961):

> "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of

> the private interest that has been affected by governmental action." [11]

Turning first to a consideration of the private interests, the tavernkeeper has several substantial reasons requiring advance notice of the accusations against him and a full hearing thereon. Where a denial of his liquor license renewal is contemplated because the municipality has received complaints of undesirable, immoral or criminal conduct in connection with the operation of his tavern, as is the case here, the tavernkeeper clearly has an interest in refuting those charges and in clearing his name and reputation in the community. In *Board of Regents v. Roth,* 408 U.S. 564, (1972), the Court stated:

> "The State in declining to rehire the respondent did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. * * * In such a case, due process would accord an opportunity to refute the charge before University officials."
>
> "The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." *Id.,* at n. 12.

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[11] *See also, Board of Regents v. Roth,* 408 U.S. 564, 570, (1972); *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972); *Stanley v. Illinois,* 405 U.S. 645, 650 (1972); *Groppi v. Leslie,* 404 U.S. 496, 500 (1972); *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971); *Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971); *Goldberg v. Kelley,* 397 U.S. 254, 267 (1970); *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 340 (1969); *Hannah v. Larche,* 363 U.S. 420, 440, 442 (1960).

In *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971), the same reason was stated:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . . This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." [12]

A second substantial private interest which demands adequate due process for the tavernkeeper is his investment in his tavern. Each of the appellees has invested more than $20,000 in his tavern operation. The licensees either own or lease the tavern premises. When the liquor license is not renewed, the tavern operator is left out in the cold, holding his property or his lease without any right to use his premises for its intended purpose. *See, e.g., Marquette Savings & Loan Asso. v. Twin Lakes,* 38 Wis. 2d 310, 156 N.W. 2d 425 (1968); *State ex rel. Higgins v. Racine,* 220 Wis. 107, 264 N.W. 490 (1936).

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[12] It should be noted that a tavernkeeper's interest in refuting charges extends not only to accusations concerning his own conduct, but also the conduct of those who work for him. For under Wisconsin law, a tavernkeeper is liable for the actions of his agents and employees whether or not he had knowledge of those acts or was present during their performance. Thus, a charge that his entertainers performed in an obscene manner or that his employees engaged in after-hours liquor sales, or sales to minors, are not only charges against the employees but against the licensee as well. Such charges affect his ability to retain his liquor license and in instances of criminal conduct he may be held strictly, though vicariously, liable. *See, e.g., State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 525, 157 N.W. 2d 568 (1968); *City of Milwaukee v. Piscuine,* 18 Wis. 2d 599, 119 N.W. 2d 442 (1962); *State v. Grams,* 241 Wis. 493, 6 N.W. 2d 191 (1942); *State ex rel. Higgins v. Beloit,* 74 Wis. 267, 42 N.W. 110 (1889).

In *Misurelli v. City of Racine,* 346 F. Supp. 43, 50 (E.D. Wis. 1972), the district court below recognized the substantial private interests of each of the appellees:

> "Denial of a liquor license renewal, as in the cases before us, involves a greater amount of potential damages than are at issue in most civil litigations and in many criminal actions. It is not unimportant to note that were not civil rights jurisdiction proper, each of the plaintiffs herein would be able to assert the necessary $10,000 controversy requirement of Title 28 U.S.C. §1331. In light of this substantial interest on the part of each of the plaintiffs and balanced against the needs of Racine and Wisconsin for an abbreviated hearing process, we find that due process demands the minimal procedural safeguards set forth above."
>
> "The stake of the plaintiffs is both their occupations and their investments for denial of the renewal of a liquor license bars them not only from selling liquor, but substantially impairs the value of their taverns" *Id.* at 48.

A third private interest calling for adequate procedural safeguards is the tavernkeeper's claim to pursue his chosen career as a tavern operator. As noted above, it would have been virtually impossible for appellees to move to other sections of the state and readily obtain liquor licenses from different municipalities, both because of the statutory "good moral character" requirement and the statutory April 15 time limit on license applications. So when the liquor licenses were not renewed, the tavernkeepers were effectively deprived of their jobs. In *Board of Regents v. Roth,* 408 U.S. 564, 574 (1972), this Court noted:

> "The Court has held, for example, that a State in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities

> 'in a manner . . . that contravene[s] due process,' . . . and, specifically, in a manner that denies the right to a full prior hearing."

Likewise, because appellees were deprived of their chosen trades when their liquor licenses were not renewed, their cases are distinguishable from the situation in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961):

> "What . . . was the private interest affected . . . ? It most assuredly was not the right to follow a chosen trade or profession . . . . Rachel Brawner remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M or with any other employer."[13]

As a fourth private interest, the tavernkeeper and his employees or agents have a constitutional right under the First Amendment to present non-obscene entertainment for their patrons. The licensee has a strong interest in assuring that his renewal application is not denied because local officials are offended by his entertainment policies. So long as the entertainers' performances are protected forms of expression under the First Amendment, local officials may not justify their actions on their own concepts of what is obscene. In *California v. LaRue*, — U.S. —, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1972), this Court declined to declare facially unconstitutional certain liquor license regulations which prohibited performances partaking of "gross sexuality" and also "some forms of visual representation which would not be found obscene." 34 L.Ed. 2d 352. While the decision upholds the enactment of such regulations, it also indicates that cer-

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[13] *See also, Willner v. Committee on Character*, 373 U.S. 96, 103 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238 (1957); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185 (1951).

tain applications of the regulations would be unconstitutional. "[W]e agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression...." *Id.* Further, the Court anticipated possible unconstitutional applications of such sweeping license regulations.

> "Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in *Seagram and Sons v. Hostetter,* [384 U.S. 35, 52 (1966)] is equally in point here: 'Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise.'" *Id.* at n. 5.

Clearly, the Court in *LaRue* recognized that licenses could not be revoked and renewals could not be denied for performances within the constitutional protection of freedom of expression. What is required then to protect a tavernkeeper's First Amendment interest is adequate notice and a hearing procedure. For, "[t]he line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." *Stanley v. Georgia,* 392 U.S. 557, 556 (1969). Precise procedures are needed which will adequately delineate protected activity from unprotected activity. "[T]he line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . ." *Speiser v. Randall,* 357 U.S. 513, 525 (1958); *see also, Freedman v. Maryland,* 380

U.S. 51, 58 (1965); *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).[14]

In summary, appellees had several substantial interests which necessitated prior notice and a full hearing prior to the non-renewal decision: their interests in countering the allegations of bad moral character, their interest in protecting their property investments, their interest in pursuing their chosen careers, and their interest in exercising rights of free speech and expression.

The State's interests in granting only a summary, non-adversary hearing are in comparison quite insubstantial.

First, it is obvious that Kenosha city officials felt that the tavern operators and entertainment policies were undesirable and harmful to the community. The State and its municipalities may legitimately claim under the police powers that they have an interest in eliminating conduct harmful to the community morals. Yet, if this is an interest which the State claims is involved, several adequate, alternative remedies were available to prohibit the allegedly harmful conduct. Sections 280.09 and 280.10 Wis. Stats. (1971) permit the issuance of an injunction and abatement orders against places "used for the purpose of lewdness." This statutory device has been used as a quick and effective remedy by the State in the past where similar conduct has been considered offensive. *See, e.g., Marseo v. Cannon*, 326 F.Supp. 1315 (E.D. Wis. 1971); and *City of Cudahy v. DeLuca*, 49 Wis. 2d 90, 181 N.W. 2d 374 (1970). There are Wisconsin criminal

[14] Several courts have already held nude or semi-nude dancing in an entertainment or theatrical context to be protected. *See e.g. In Re Giannini*, 69 Cal. 2d 563, 446 P. 2d 535, 72 Cal. Rptr. 655 (1968); *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971); *P.B.I.C., Inc. v. Byrne*, 313 F. Supp. 757 (D. Mass. 1970).

statutes which prohibit the production or performance of an obscene performance, §944.21(1)(d), Wis. Stats. (1971), and prohibit public and indecent exposure of a sex organ, §944.20(2), Wis. Stats. (1971). The disorderly conduct statute, §947.01(1) Wis. Stats. (1971), which prohibits indecent conduct, could also be invoked in an emergency situation. *See, e.g., State v. Maker,* 48 Wis. 2d 612, 180 N.W. 2d 707 (1970). Finally, there are liquor license revocation procedures as opposed to non-renewal procedures which provide a municipality with an efficient remedy for terminating the license of any tavernkeeper who "keeps or maintains a disorderly or riotous, indecent or improper house." *See,* §§176.11 and 176.12, Wis. Stats. (1971).

Clearly, the State's interest in achieving a speedy or summary termination of appellees' licenses because of alleged harmful consequences for the community was not involved here at all. The State had many effective tools to prohibit any such harmful conduct; and it had the efficient revocation procedures at its disposal if needed. Yet the State chose to proceed under the renewal procedures which by statute necessarily extend over a three month duration. So the State cannot claim that it needed an adjudication of the appellees' renewal applications as quickly as possible to prevent harm to the community. While appellees' renewal applications were pending the State could have used alternative remedies at any time during April, May or June if the alleged injury to the community was so imminent.

As a second State interest in summary adjudication, appellant asserts that it would be inconvenient for some municipalities, especially the small ones, to hold renewal hearings. (Brief of Appellant, p. 36). It is argued that

they would be forced to hire hearing examiners and attorneys to handle the proceedings. This interest is both speculative and insubstantial. As noted in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972):

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency."

A third interest in summary adjudication, asserted by the State, is that the cost of providing renewal hearings at the municipal level would be so great as to discourage denials of licenses in many cases. (Brief of Appellants, p. 40). Again, the State's interest in avoiding additional cost is insubstantial. "While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process." *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970), quoting from *Kelly v. Wyman*, 294 F.Supp. 893, 901 (S.D. N.Y. 1968). "Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement." *Bell v. Burson*, 402 U.S. 535, 540 (1971).

As the three-judge district court pointed out, problems of additional cost to the state and its municipalities can easily be avoided by "taxing 'costs' to the losing party, as is the practice in litigation before a court." *Misurelli v. City of Racine*, 346 F.Supp. 43, 48 (E.D. Wis. 1972). The requirement of a full hearing for tavernkeepers pending their renewal applications would not result in any extension of governmental benefits to persons who were subsequently determined to be ineligible for those benefits. Unlike the situation in *Goldberg v. Kelly, supra*, where the government is required to maintain assistance payments pending hearing to persons who may subse-

quently be determined ineligible for those payments, the tavernkeeper is by statute clearly entitled to the benefits of his liquor license pending his application. *Cf. Goldberg v. Kelly,* 397 U.S. 254, 266 (1970).

It is not unreasonable to urge that the State and its municipalities have an interest in extending prior notice and full hearing rights to tavernkeepers who question proposed denials of their renewal applications. A full and adequate hearing procedure will assure that liquor licenses are being held by persons of good moral character and responsibility in furtherance of the state public policy. *See, e.g., Stanley v. Illinois,* 405 U.S. 645, 655 (1972):

> "Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him."

As noted in *Misurelli v. City of Racine,* 346 F.Supp. 43, 48 (E.D. Wis. 1972):

> "If a legislative hearing may be more convenient, certainly the adversary hearing of the type we hold as required today better serves the state and city's interest in ascertaining the truth. None of the rights set forth in our opinion today preclude the gathering of information; rather the rights set forth, act to better insure that Racine will have the entire picture before it when it acts."

Full and open hearings into the proposed reasons for denying the application will also deter corrupt practices and governmental abuses in the dispensation of license privileges.

> "The possibility of high profits on the one hand and the danger of strict governmental limitations on the other hand create a fertile breeding ground for the temptations of graft, corruption, and other abuses

> of governmental office. If one applicant for a license is preferred over another equally qualified as a political favor or as the result of a clandestine arrangement, the disappointed applicant is injured, but the injury to the public is much greater. The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that their expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." *Hornsby v. Allen*, 326 F. 2d 605, 609-610 (5th Cir. 1964).

Finally, full hearings in an adversarial context no doubt would tend to reduce the number of petitions for review filed in the state courts. If a litigant believes that the licensing authority did not give him an opportunity to prepare or did not hear all the evidence, and his license is not renewed, he will want to seek review from the courts. If he has received a full hearing, this concern will have already been satisfied. Adequate hearings at the administrative level will save the state additional costs by removing these cases from overburdened court dockets.

The decision to renew or not to renew a liquor license is not purely a legislative function, nor is it just an investigative function. The license committee and the common council are adjudicating the specific rights and liabilities of the tavernkeepers before them. Because their determinations necessarily involve an adjudicative process, prior notice and an adversary hearing are essential to afford due process of law. This is the directive announced in *Hannah v. Larche*, 363 U.S. 420, 442 (1960):

> "Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that

those agencies use the procedures which have traditionally been associated with the judicial process."

B. Appellees were Deprived of Advance Notice of the Charges Against Them and Were Deprived of an Adversary Hearing Where They Could Confront and Cross-examine the Witnesses Against Them and Where a Verbatim Record of Sworn Testimony Could be Made.

Having balanced the interests of the licensees and the interests of the State, and having determined that the private interests of the licensees far outweigh any State interest in a summary, nonadversary procedure, the question remains of what process is due. The tavernkeepers sought only and the district court required only that the State follow "minimum procedural safeguards." *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970).

Sections 176.05(1) and 176.05(8), Wis. Stats. (1971), have been authoritatively construed by the Wisconsin Supreme Court to permit municipalities to deny liquor license renewal applications after providing the tavernkeepers with only a legislative-type hearing. In *State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 524, 157 N.W. 2d 568 (1968), the court stated:

> "Ruffalo argues that upon renewal he is entitled to a trial-type hearing upon his application under the due-process clause of the Constitution. *Hornsby v. Allen, supra.* However, the granting of a liquor license is a legislative function which does not require a trial-type hearing to comport with due process. From time immemorial, legislators and bodies exercising the legislative function have held the legislative type of hearing wherein one is given notice of the hearing and a fair opportunity to state his position on the issue. . . . A legislative type of hear-

ing does not include necessarily the right to cross-examine or require testimony to be given under oath." [15]

To some extent the tavernkeepers did receive "notice of the hearing" required in *Ruffalo*. Although they were never informed that any particular meeting was designed to be a hearing on their license applications, they were notified of a special meeting where the finance committee was to "interview" each licensee concerning his application. (R. 202) Perhaps then, for constitutional purposes, appellees were duly afforded notice of the pendency of the proceedings. *See, Robinson v. Hanrahan,* 409 U.S. 38, 39 (1972); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). Moreover, each licensee was either personally present or represented by his attorney at the finance committee and common council meetings. So each tavernkeeper had an "opportunity to state his position on the issue." *State ex rel. Ruffalo v. Common Council, supra.* Under the standards established by the Wisconsin Supreme Court, appellees were not deprived of due process of law. However, appellees submit that the license renewal procedures were constitutionally defective in several respects.

First, the tavernkeepers quite obviously were denied advance notice of the accusations or complaints against them. While appellees were well aware of the nature

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[15] The construction of the State statute by the Wisconsin Supreme Court is, of course, binding upon this Court. "[T]he Wisconsin Court has spoken and, by majority vote, has construed the State statute then in effect in that very way. Construction of the statute is the State court's task. It is not our task. And we are bound by the Wisconsin Court's decision as to the meaning and application of a Wisconsin statute." *Groppi v. Wisconsin,* 400 U.S. 505, 513 (1971) (Blackmun, J. concurring). *See also, Gooding v. Wilson,* 405 U.S. 518, 520 (1972), and *Seagram & Sons v. Hostetter,* 384 U.S. 35, 51, 52 (1966).

of their tavern entertainment, they had no reason to know that the proposed basis for denying their applications was because they had "defiled the reputation of the city;" furnished "an atmosphere conducive to prostitution . . . setting improper moral standards for the children in [the] community;" that law enforcement problems had increased and that police department records indicated "that parking and litter problems around the area and crimes of a violent nature [had] escalated. . . . " Nor had they been made aware that there had been increased police surveillance proving "costly to the taxpayers of the city," or that the live entertainment which they offered was "not attractive to new industry . . . coming into the community," nor that it "attracts an undesirable element from other cities. . . ." (R. 211) Yet these were the official reasons given for denying their applications. The State suggests that there was no notice problem at any time during this dispute since the tavernkeepers did not deny that they offered nude dancing entertainment at their establishments. (Brief of Appellants, p. 35, 39) The State plainly overlooks the fact that the dispute was not about nude dancing at the taverns but instead was about the alleged social ills and harmful consequences to the community which resulted from the tavern entertainment. The complainants against the licensees accused them of causing a long list of harms to the community. And the Common Council's decision to deny the applications was based solely (at least officially) upon that list. Yet at no time prior to either the finance committee meetings or the Common Council meetings, had the tavernkeepers been given notice of the list of complaints against them.[16]

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[16] It should also be noted that the licensees were never given notice of the rules that would be followed during the committee meetings or the Council meetings. Most importantly, appellees were never told

Due process required not only that the tavernkeepers be given notice of the pendency of the proceedings, but also that they be notified of the nature of the complaints or accusations against them.

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Morgan v. United States*, 304 U.S. 1, 18-19 (1938)[17]

Notice of the reasons urged for denial is particularly necessary where considerable discretion resides in the decision maker, and where the reasons for denial may be so wide-ranging and vague. In *Morgan v. United States, Id.* at 21, the Court also noted:

> "[T]he breadth of the secretary's discretion under our rulings applicable to such a proceeding . . .

(continued)
which decision-making body, the finance committee or the Common Council, would make the final decision on the renewal applications. Section 176.05(8), Wis. Stats. (1971), provides in pertinent part: "All town and village boards and common councils, or the duly authorized committees of such councils, shall meet . . . for the purpose of acting upon such applications for license (*sic*), as may be presented to them. . . ." The State statute apparently contemplates a delegation of final licensing authority to common council committees, if the councils so choose. Consequently, appellees entered the Kenosha city hall on four occasions not only without knowledge of the commitee and council rules on applications, but also without knowledge of which body would make the final decision on the applications.

[17] *Accord, Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); *Groppi v. Leslie*, 404 U.S. 496, 502 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *Willner v. Committee on Character*, 373 U.S. 96, 105 (1963); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

> [citations omitted] places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them. . . ."

Appellees were also denied effective rights of confrontation and cross-examination. The list of reasons prepared by the finance committee for rejecting the license applications reveals the degree to which the committee and the common council relied upon rumors and speculative assertions proffered by the few witnesses. The vague and unsupported accusations leveled at the licensees that they had contributed to prostitution, increased parking and litter problems, attracted undesirable elements from other cities, set improper moral standards for children and escalated crimes of a violent nature in the city are perfect examples of charges which the accused should be permitted to counter by cross-examination and confrontation of the witnesses. As stated by this Court in *Greene v. McElroy,* 360 U.S. 474, 496-497 (1959):

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections and the requirements of confrontation and cross-examination. They have

> ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." [18]

The lower court also ruled that the statements of witnesses at the renewal hearings should be under oath and recorded verbatim. "An applicant has a right to be safeguarded from license denial by deceit. Testimony under oath acts to ensure truthful testimony, and a verbatim transcript acts to ensure against arbitrary denials." *Misurelli v. City of Racine,* 346 F. Supp. 43, 50 (1972). These legal protections have been approved by this Court as well. In *Morrissey v. Brewer,* 408 U.S. 471, 484 (1972), the following was noted: "What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on *verified* facts. . . ." (Emphasis supplied.) In *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970), the Court stated that "a complete record and a comprehensive opinion, . . . would serve primarily to facilitate judicial review and to guide future decisions. . . ." [19]

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[18] *See also, Morrissey v. Brewer,* 408 U.S. 471, 489 (1972); *Goldberg v. Kelly,* 397 U.S. 254, 268-269 (1970); *Willner v. Committee on Character,* 373 U.S. 96, 103 (1963); *Reilly v. Pinkus,* 338 U.S. 269, 276 (1949).

[19] The Court also noted that such a requirement would be unnecessary at a pre-termination hearing stage since a full-fleged trial-type hearing is given subsequent to the termination of benefits. Therefore, the need for a complete record in the present situation is all the more apparent because the liquor licensees are not entitled to a full, trial-type hearing on the reasons for denying their applications subsequent to the municipality's decision.

Moreover, the utility of a verbatim record for assisting appellate review is well demonstrated in the decisions in *Greene v. McElroy,* 360 U.S. 474 (1959) and *Morgan v. United States,* 304 U.S. 1 (1938). Without the lengthy verbatim records in those cases, the process of appellate review would have been far more difficult, if not impossible. In the present case it is impossible to know what transpired at the finance committee meetings. The opportunity for effective appellate review is thus severely limited.

Appellees do not demand unreasonable procedures. They merely request the same "minimum procedural safeguards" cited by this Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970).

C. Due Process Requires a Full Hearing on the Merits Prior to a Ruling on the License Application; Subsequent Court Remedies Are Inadequate.

The State suggests that the full hearing which appellees seek, if required, need not precede the administrative ruling on the renewal applications. Instead, the full hearing, it is suggested, can be obtained by court review. (Brief of Appellants, pp. 37-41.) Yet the State admits that an applicant would only have a limited right of review. Under the State's proposed plan, an applicant would never get a full hearing on the merits. The State relies on the very decision, *State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 525, 157 N.W. 2d 571 (1968), which describes the limited right of court review:

> "The reviewing court cannot substitute its judgment for the legal discretion of the Common Council on the merits of the application or review the adequacy of the grounds for its decision other than in the

> context of determining whether the action of the licensing authority was arbitrary, capricious or discriminatory." [20]

Moreover, the suggestion that any possible deprivation of rights following an abbreviated hearing before municipal officials can be cured by subsequent court review has been firmly rejected. "This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois,* 405 U.S. 645, 647 (1972). Also, a process that would compel the aggrieved licensee to seek review in order to obtain a full hearing on the merits effectively shifts the burden of proof from the State to the person aggrieved. This burden would not have been imposed upon him had the State given him adequate procedures initially. *See, Armstrong v. Manzo,* 380 U.S. 545, 551 (1965).

Because a reviewing court does not provide a full hearing subsequent to the denial of a renewal application, it is imperative that a full hearing on the merits be held prior to any decision on the application. "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents v. Roth,* 408 U.S. 564, 569-570 (1972).

> "[I]t is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of

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[20] The same court stated in *Common Council of Oshkosh v. State,* 59 Wis. 423, 428-429, 18 N.W. 324 (1884): "It would be clearly irregular and improper to admit the proposed testimony on the hearing of the writ of *certiorari.* That writ was intended to review the proceedings of the common council to ascertain whether they had been according to law. This is its scope and object. It does not give a new trial in the court reviewing the proceeding or perform the office of an appeal in any sense."

> the case' *before* the termination becomes effective." *Bell v. Burson,* 402 U.S. 535, 542 (1971). [Emphasis in original.][21]

The State has not claimed that the municipalities were confronted with an emergency situation. Moreover, the fact that the license applications were pending from April until June of 1971 without any attempt by the city officials to revoke the liquor licenses indicates that there was no emergency. Therefore, an effective prior hearing was required.

III. ABSTENTION BY THE DISTRICT COURT WAS NOT APPROPRIATE BECAUSE THE STATE STATUTE HAD ALREADY BEEN AUTHORITATIVELY CONSTRUED BY THE STATE SUPREME COURT AND WAS NOT AMBIGUOUS.

The State suggests that the district court should have abstained from ruling on the constitutionality of the state statute. Although it recognizes that the Three-Judge Court Act (28 U.S.C. §2281, *et seq.*) was purposely enacted to permit federal court injunctions against the enforcement of state statutes, the State nevertheless contends that the district court should have stayed its hand in this dispute. The State, however, fails to offer any grounds justifying the application of the abstention doctrine. First of all, there can be no claim that the state statute is ambiguous on the issues raised herein. Any ambiguities in the statute were resolved by the decision in *State ex*

---

[21] *Accord, Boddie v. Connecticut,* 401 U.S. 371, 379 (1971); *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972); *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 342 (1969); *Armstrong v. Manzo,* 380 U.S. 545, 550 (1965); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1949); *Opp Cotton Mills v. Administrator,* 312 U.S. 152, 153 (1941).

rel. Ruffalo v. Common Council, 38 Wis. 2d 518, 157 N.W. 2d 568 (1968), where the Wisconsin Supreme Court ruled that §§176.05(1) and 176.05(8), Wis. Stats. (1971), do not encompass trial-type hearing procedures. The situation, therefore, is strikingly similar to that found in *Wisconsin v. Constantineau,* 400 U.S. 433, 438-439 (1971):

> "But the abstention rule only applies where 'the issue of state law is uncertain.' [Citation omitted.] Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe. [Citations omitted.]
>
> "In the present case the Wisconsin Act does not contain any provision whatsoever for notice and hearing. There is no ambiguity in the state statute. There are no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances or under some construction but not under others. . . . [A]bstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the Federal Court should not abstain but should proceed to decide the Federal Constitutional claim."

Second, as far as the Kenosha tavernkeepers are concerned, this is not a situation where the decision of the federal district court in any way interfered with an ongoing state court action involving the parties. The cautionary doctrine of *Younger v. Harris,* 401 U.S. 37 (1971) is inapplicable. State court proceedings concerning the denial of the Kenosha appellees' liquor license applications were *not* pending at the inception of this lawsuit or at any time during the lawsuit. Thus, the *Younger* doctrine of equity practice and comity is inapplicable, and abstention does not apply. *Lake Carriers' Assn. v. MacMullan,* 406 U.S. 498 (1972). Absent special

circumstances it was the duty of the district court to give due respect to appellees' choice of a federal forum for the hearing and decision of their federal constitutional claims. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

CONCLUSION

For the foregoing reasons appellees respectfully urge this Court to affirm the order of the district court declaring §§176.05(1) and 176.05(8) of the Wisconsin Statutes to be unconstitutional and enjoining the operation of the statutes insofar as they permit the renewal of liquor licenses to be denied without permitting the applicants an opportunity for notice and an adversary-type hearing.

Respectfully submitted,

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Of Counsel:
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FILE COPY

APR 12 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-658

CITY OF KENOSHA,
A Wisconsin Municipal Corporation;
CITY OF RACINE,
A Wisconsin Municipal Corporation;
ROBERT W. WARREN,
Attorney General of the State of Wisconsin,
Intervening Defendant;
Appellants,

v.

PETER G. BRUNO;	No. 71-C-330
BRUCE BLEASHKA;	No. 71-C-331
SLEEPY'S, INC.;	No. 71-C-332
FRED KAUZRICH;	No. 71-C-333
JEANETTE STENZEL;	No. 71-C-334
CHARLES WIGINTON;	No. 71-C-352
RICHARD A. MISURELLI and TERRANCE MC CUE;	No. 71-C-316
GO-GO OF RACINE, INC., A Wisconsin Corporation, THEODORE F. WITHERIL, and JEROME J. RUETZ, JR.; and	No. 71-C-317
DAVID H. ROBERS;	No. 71-C-335

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

REPLY BRIEF

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April 13, 1973

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IN THE

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October Term, 1972

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Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

REPLY BRIEF

ARGUMENT

I. Due Process Claims Are Novel But Not Convincing.

A. Refusal of liquor license is not deprivation of "liberty" within the meaning of the due process clause of the Fourteenth Amendment .

The brief filed on behalf of appellees Sleepy's, Inc., Kauzrich, and Wiginton adopts a novel theory of "liberty" in order to squeeze their case into the due process provisions of the Fourteenth Amendment. They claim that the following language in *Board of Regents v. Roth* (1972), 408 U.S. 564, 570-571, 92 S.Ct. 2701, 2707, 33 L.Ed. 2d 548, supports the view that the denials of their liquor license renewals deprived them of "liberty" without due process of law:

> "There *might* be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case. [Emphasis supplied].
>
> "* * * It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed. 2d 515; * * *."

Appellees, in urging the unconstitutionality of the manner in which their liquor license renewal applications were denied, have indulged at least one totally speculative, which is to say legally insubstantial, premise: namely, that the reasons for the denial of their renewal applications were in fact and effect tantamount to the judgment that the appellees themselves lacked "good moral character." In fact this is false for the simple reason that the moral integrity of the appellees themselves is not the underlying issue here. Nude dancing or, more importantly, the manifest effect of nude dancing combined with liquor sales on the appellants, cities of Racine and Kenosha, is. By denying appellees the renewal of their individual liquor licenses, appellants have accomplished nothing more than the effectuation of their determination that nude dancing where liquor is sold was, to say the least, not in the best interests of their respective communities. To urge otherwise is at best idle speculation.

Why didn't the city councils favor nude dancing in their taverns? Legislatively, they determined that it was not in the best interests of their communities. Under Wisconsin law the cities may do so individually just as the California Department of Alcoholic Beverage Control could do so in *California v. LaRue* (1972), — U.S. —, 93 S.Ct. 390, 34 L.Ed. 2d 342, the only difference being that local option in Wisconsin permits the cities, villages, and towns to regulate these matters by *ordinance* or *resolution*. *Bjordal v. Town Board* (1939), 230 Wis. 543, 547, 284 N.W. 534.

The nude dancing activities described in pages 64-72 of the appendix may give some hint as to why the municipalities involved herein decided not to license a combination of liquor and nude dancing. Judicial notice can be taken of the California

experience in regard to the same combination. *LaRue*, 93 S.Ct. 393. There is no showing in the record leading to summary judgment that "good moral character" required of a liquor licensee by sec. 176.04 (9), Wis. Stats., was at issue in any of the cases involved in this appeal.

Thus, insofar as it must be considered mere speculation on the part of appellees to argue that they were "branded as persons of bad moral character" (appellees' brief, at p. 17) when their renewal applications were denied, their argument that they have been deprived of liberty without due process of law must be considered equally speculative.

B. No "property" interests stated.

Appellees' argument that the Wisconsin Supreme Court has interpreted legislation requiring stated reasons for denial of renewal of liquor licenses as creating a property right is self-defeating.

As was stated in *State ex rel. Boroo v. Town Board* (1960), 10 Wis. 2d 153, 160-161, 102 N.W. 2d 238, the statute involved, sec. 176.05 (8), Wis. Stats., enables the reviewing court to determine if the action was arbitrary, capricious, discriminatory, or an abuse of discretion. Thus, the Wisconsin courts provide protection against arbitrary denials. The aid of the federal court system is not needed.

As this court said in *Roth*, property interests are not created by the constitution. They come from such sources as state law. No such source has been shown by appellees. The investment of $20,000 that each appellee is stipulated to have must represent real estate, fixtures and stock. The

license has no value under Wisconsin law. *State ex rel. Ruffalo v. Common Council* (1968), 38 Wis. 2d 518, 157 N.W. 2d 568.

II. Due Process Does Not Require Adversary Hearing.

A. Minimal procedural due process met by legislative hearing.

If minimal procedural due process is required in a liquor license situation, the standards adopted by the district court in *Roth*, 310 F. Supp. 972, 979-980, approved by the court of appeals, 446 F. 2d 806, 809-810, and approved by Mr. Justice Douglas in his dissenting opinion in *Roth*, would be sufficient where factual issues arise and the applicant specifically asks the licensing body for such opportunity to submit evidence relevant to the stated reasons:

> "* * * I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact." 92 S.Ct. 2713.

If the liquor licensees who were denied renewal petitioned the city council of the respective cities to hold a hearing on the issue of whether they had or intended to feature nude dancing or on the question of whether nude dancing caused the problems referred to by the city involved, a Wisconsin court could determine whether subsequent action by the city was "arbitrary, capricious or discriminatory." However, no such request was made by any of the appellees.

The hearing which the court in *Roth* said would be necessary to clear "good name, reputation, honor or integrity" would not assure reemployment where nonretention is justified on other grounds. The Honorable John W. Reynolds, Judge of the United States District Court for the Eastern District of Wisconsin, so construed *Roth* in a decision issued on March 31, 1973. *Alan Whitney v. Board of Regents of the University of Wisconsin*, No. 72-C-317. This conclusion seems inescapable in view of footnote 12 in *Roth*, 92 S.Ct. 2707.

B. No free speech issues involved.

The tavernkeepers interests in exercising rights of free speech and expression are illusory. This court set the matter clearly in focus in *LaRue*, 93 S.Ct. 390:

> "* * * While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments which it licenses to sell liquor by the drink."

Likewise, the cities of Racine and Kenosha under the local option laws of Wisconsin can decide not to mix naked bodies and alcohol.

There is nothing in the actions of the two cities which would prevent these entrepreneurs from having their shows in local churches, YMCA's, art centers, or other civic organizations which may want to stage such forms of art.

Respectfully submitted,

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April 13, 1973

CERTIFICATE OF SERVICE

I, the undersigned, a member of the Bar of this Court, do hereby certify that on April 19, 1973, I duly mailed three copies of the Reply Brief of appellants to each of the attorneys for the appellees, addressed as follows:

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CITY OF KENOSHA ET AL. *v.* BRUNO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 72-658. Argued April 18, 1973—Decided June 11, 1973

Appellees, who apparently because of alleged nude dancing at their retail liquor establishments were denied renewal of their one-year liquor licenses, brought suit under 42 U. S. C. § 1983 for declaratory and injunctive relief against the cities of Racine and Kenosha. Appellees claimed deprivation of procedural due process arising from the cities' failure to hold full-blown adversary hearings before refusing to issue license renewals, and the unconstitutionality of the local licensing scheme. The Wisconsin Attorney General intervened as a party defendant in the proceedings. The cases were submitted on cross-motions for summary judgment and stipulations of fact. A three-judge District Court held that in light of the "equitable nature" of the actions it had jurisdiction under 28 U. S. C. § 1343 and the court declared the statutory scheme unconstitutional and enjoined its enforcement. *Held:*

1. A city is not a "person" under 42 U. S. C. § 1983 where equitable relief is sought, any more than it is where damages are sought, *Monroe* v. *Pape*, 365 U. S. 167, 187, and the District Court, therefore, erred in concluding that it had jurisdiction over the complaints under 28 U. S. C. § 1343 since only the two municipalities were named as defendants. Pp. 4–6.

2. The District Court on remand should consider the jurisdictional questions presented by the State Attorney General's intervention and the availability of 28 U. S. C. § 1331 jurisdiction, as well as the decisions issued subsequent to that court's judgment in *Board of Regents* v. *Roth*, 408 U. S. 564, and *Perry* v. *Sindermann*, 408 U. S. 593, which are germane to the due process issue, and *California* v. *LaRue*, 409 U. S. 109, dealing with broad state authority over liquor distribution. Pp. 6–8.

Vacated and remanded.

Syllabus

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined. DOUGLAS, J., filed an opinion dissenting in part.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72–658

City of Kenosha, Wisconsin, et al., Appellants, *v.* Peter G. Bruno et al. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[June 11, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellees, owners of retail liquor establishments, were holders of tavern liquor licenses [1] issued under Wisconsin law by appellants, the cities of Racine and Kenosha. Acting pursuant to Wis. Stat. Ann. § 176.05 (1), (8), the Cities denied appellees applications for renewal of their one-year licenses after holding public "legislative" hearings. Alleging, *inter alia*, deprivations of their Fourteenth Amendment procedural due process rights in such denials and, by amended complaints, the unconstitutionality of §§ 176.05 (1), (8), appellees brought these federal civil rights actions for declaratory and injunctive relief naming in each case only the appropriate municipality as a defendant. The District Court entered temporary restraining orders commanding the immediate issuance of licenses and convened a three-judge district court pursuant to 28 U. S. C. § 2881 to rule on the constitutionality of the statutory licensing procedure. Thereafter, the Attorney General of Wisconsin was allowed to intervene as a party defendant on his own

[1] In the case of appellee Misurelli, it appears from the record that his partner was actually the holder of the expired license. The District Court held, however, that in substance his application was no different from those of the other appellees.

motion. On cross-motions for summary judgment, the District Court declared the statute unconstitutional and enjoined its enforcement. This direct appeal followed.

Under the Wisconsin local licensing scheme, the governing bodies of municipalities are authorized to grant liquor licenses "to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors. . . ." Wis. Stat. Ann. § 176.05 (1).[2] The statutory scheme has been interpreted by the Wisconsin Supreme Court to require a "legislative type of hearing wherein one is given notice of the hearing and a fair opportunity to state his position on the issue," in situations where municipalities have denied an application for renewal of a license. *Ruffalo* v. *Common Council*, 38 Wis. 2d 518, 524, 157 N. W. 2d 568, 571 (1968). Such applications may not be rejected "without a statement on the clerk's minutes as to the reasons for such rejection," Wis. Stat. Ann. § 176.05 (8),[3] and the

[2] Wis. Stat. Ann. § 176.05 (1) provides:

"(1) Authority to grant licenses. Each town board, village board, and common council may grant retail licenses, under the conditions and restrictions in this chapter contained, to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors. No member of any such town board, village board or common council shall sell directly or indirectly or offer for sale, to any person, firm, or corporation that holds or applies for any such license any bond, material, product, or other matter or thing that may be used by any such licensee or prospective licensee in the carrying on of his or its said business."

[3] Wis. Stat. Ann. § 176.05 (8) provides:

"(8) Annual license meetings. All town and village boards and common councils, or the duly authorized committees of such councils, shall meet not later than May 15 of each year and be in session from day to day thereafter, so long as it may be necessary, for the purpose of acting upon such applications for license as may be presented to them on or before April 15, and all applications for

state courts have certiorari jurisdiction to review whether such refusals by the councils are arbitrary, capricious or discriminatory. *Ruffalo* v. *Common Council, supra.*

In the case of the Racine denials,[4] it was stipulated that the question of the appellees applications for licenses was referred to the License and Welfare Committe of the Common Council and that at public hearings conducted by that Committee, appellees were present and heard oral objections to the renewal of the licenses for their taverns.[5] After holding a public hearing, the Common Council followed the Committee's recommendation and voted to deny the applications apparently because of the adverse effects on the community of nude dancing in the bars.

It was also stipulated that at all meetings, all persons including appellees were given an opportunity to speak, but no speaker was sworn. None of the testimony was recorded and no verbatim transcript was made. Appellees were not advised that they could cross-examine any of the speakers, and they did not request such an opportunity. And there was no advance written specification of the charges against any of the bars.

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license so filed shall be granted, issued or denied not later than June 15 for the ensuing license year, provided that nothing shall prevent any governing body from granting any licenses which are applied for at any other time. As soon as an application has been approved, a duplicate copy thereof shall be forwarded to the secretary of revenue. No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection."

[4] The Racine denials were utilized by the District Court as the basis for the main opinion holding the Wisconsin scheme unconstitutional and the other cases were decided on the basis of the main opinion. We are therefore primarily considering the factual background of the Racine denials in our disposition.

[5] No such stipulation was filed for appellee Robers, however.

Relying on two Seventh Circuit decisions,[6] the three-judge court (as had the single judge) held that "in light of the equitable nature of this action" it had jurisdiction pursuant to 28 U. S. C. § 1343.[7] Concluding that Racine's interest in being able to deny the renewal of liquor licenses with no other safeguard than a legislative hearing is "minimal," the court balanced that interest against that of appellees, assertedly their occupations and their investments, and determined that the Due Process Clause of the Fourteenth Amendment requires municipalities to grant an "adversary-type hearing in which the applicant is given timely notice of the reasons urged for denial [of renewal of his license] and an opportunity to present, confront, and cross-examine witnesses under oath with a verbatim transcript."

I

Neither party to the appeal has questioned the jurisdiction of the District Court, but "it is the duty of this Court to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded." *Louisville and Nashville Railroad* v. *Mottley*, 211 U. S. 149, 152. Appellees alleged that they brought their action under 42 U. S. C. § 1983,[8] and that the Dis-

[6] *Schnell* v. *City of Chicago*, 407 F. 2d 1084 (CA7 1968), and *Adams* v. *City of Park Ridge*, 293 F. 2d 585 (CA7 1961).

[7] 28 U. S. C. § 1343 (3) provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . ."

[8] 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or

trict Court therefore had jurisdiction under 28 U. S. C. § 1343. The District Court agreed. The only defendants named in the complaints, however, were the municipalities of Kenosha and Racine. In considering the reach of § 1983 in *Monroe* v. *Pape*, 365 U. S. 167 (1961), this Court examined the legislative history surrounding its enactment and said:

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular act to include them." *Id.*, at 191.

The District Court relied on *Schnell* v. *City of Chicago*, 407 F. 2d 1084 (CA7 1968), and *Adams* v. *City of Park Ridge*, 293 F. 2d 585 (CA7 1961), in holding that *Monroe* was limited to actions for damages, and that cities were proper defendants under § 1983 where equitable relief was sought. *Adams, supra,*[9] in turn, relied on this Court's *per curiam* opinion in *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955). But in none of the three opinions in *Holmes* was the issue of whether or not a municipality is a "person" within the meaning of § 1983 discussed. The authority of that case as support for the proposition that a city is a "person" under § 1983 where equitable relief is sought, but is not a "person" under the same section where damages are prayed for,

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causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[9] The Court in *Schnell* v. *City of Chicago, supra,* simply followed the previous circuit decision in *Adams* v. *City of Park Ridge, supra,* with no independent analysis.

is at least seriously weakened by the following observation in *Monroe, supra,* 365 U. S., at 191, n. 50:

> "In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U. S. C. § 1983 were alleged. See, *e. g., Douglas* v. *City of Jeannette,* 319 U. S. 157; *Holmes* v. *City of Atlanta,* 350 U. S. 879. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a 'person' within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases."

We find nothing in the legislative history discussed in *Monroe,* or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in *Monroe,* "Congress did not undertake to bring municipal corporations within the ambit of" § 1983, 365 U. S., at 187, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343.

After the complaints had been filed and issue joined, the Attorney General of Wisconsin was allowed to intervene as a party defendant in the actions. The District Court, having concluded that it had jurisdiction to entertain the original complaint under § 1343, understandably did not address itself to the question of whether the intervention of the Attorney General as a party would cure the jurisdictional defect which we now find to exist in appellees' complaints. The District Court also observed that "were not civil rights jurisdiction proper, each of the plaintiffs herein would be able to assert the

necessary controversy requirement of Title 28 U. S. C. § 1331." But although appellees in the Racine denials alleged jurisdiction pursuant to to 28 U. S. C. § 1331 as well as § 1343, and in each complaint there was an allegation of an investment in a tavern of at least $20,000, the defendant municipal corporations answered by putting the appellees to their proof as to the amount in controversy. Since the cases were submitted and decided on cross-motions for summary judgment and stipulations of fact, and no stipulation as to the amount in controversy was filed, we cannot say on this state of record whether or not jurisdiction over the complaints was affirmatively established. See *Hague* v. *CIO*, 307 U. S. 496, 507–508 (1939), and cases therein cited. With respect to the Kenosha denials, there was a stipulation as to jurisdictional amount in the proceedings before the single-judge District Court, and an allegation of the requisite jurisdictional amount in the amended complaint which for the first time challenged the constitutional validity of the Wisconsin statutory licensing scheme. No answer was filed to the amended complaint prior to the entry of judgment by the District Court.

We have had the benefit of neither briefs, arguments, nor explicit consideration by the District Court of the jurisdictional questions presented by the intervention of the Attorney General as a party, and the availability of § 1331 jurisdiction in view of the state of the record below. We therefore remand the case to the District Court for consideration of these issues.

II

Appellees' licenses have been neither revoked nor suspended. Their claim of deprivation of Fourteenth Amendment procedural due proces rights arises from the failure of the cities of Kenosha and Racine to hold full-blown adversary hearings before refusing to renew their

one-year licenses. Our decisions last year in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and *Perry* v. *Sindermann*, 408 U. S. 593 (1972), discussed the nature of "liberty" and "property" that is protected against denial without due process by the Fourteenth Amendment. The District Court did not have the benefit of these cases at the time that it entered its judgment, and it followed, in part, the decision of the Court of Appeals for the Seventh Circuit which was reversed in *Roth*. It therefore made no evaluation of "property" or "liberty" interests which might require a due process hearing, or of the nature of such a hearing if it were required in the light of our opinions in *Roth, supra,* and *Perry, supra.*

The District Court likewise did not have the benefit of this Court's decision in *California* v. *LaRue*, — U. S. — (1972). There we held again that while the Twenty-first Amendment did not abrogate a requirement of procedural due process, *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), it did grant the States broad authority over the distribution and sale of liquor. We also held that regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances were facially constitutional.

We therefore direct the District Court, after addressing the issue of jurisdiction, to reconsider its judgment in the light of *Roth*, *Perry*, and *LaRue*. The judgment of the District Court is vacated and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 72-658

City of Kenosha, Wisconsin, et al., Appellants, *v.* Peter G. Bruno et al. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[June 11, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring.

Although I join the opinion of the Court, I would add that I find unimpeachably correct the District Court's conclusion that petitioners failed to comply with the requirements of the Due Process Clause in denying renewal of respondents' liquor licenses. Nevertheless, since the defendants named in the complaints were the municipalities of Kenosha and Racine, jurisdiction cannot be based on 28 U. S. C. § 1343. *Moor* v. *County of Alameda*, — U. S. — (1973); *Monroe* v. *Pape*, 365 U. S. 167 (1961). Respondents did assert 28 U. S. C. § 1331 as an alternative ground of jurisdiction, but I agree with the Court's conclusion that existence of the requisite amount in controversy is not, on this record, clearly established. If respondents can prove their allegation that at least $10,000 is in controversy, then § 1331 jurisdiction is available, *Bell* v. *Hood*, 327 U. S. 678 (1946); cf. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971), and they are clearly entitled to relief.

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[June 11, 1973]

MR. JUSTICE DOUGLAS, dissenting in part.

I have expressed my doubts in *Moor* v. *County of Alameda*, — U. S. —, that our decision in *Monroe* v. *Pape*, 365 U. S. 167, bars equitable relief against a municipality. In that case the legislative history* on which that construction of "person" as used in 42 U. S. C. § 1983 was based related to the fear of mulcting municipalities with damage awards for unauthorized acts of its police officers. *Monroe* v. *Pape* may be read as containing *dicta* that a remedy by way of declaratory relief or by injunction is barred by § 1983 as well as suits for damages. Yet I do not think we should decide that question without full briefing and considered argument.

I do, however, concur in a remand for reconsideration by the District Court in light of *Board of Regents* v. *Roth*, 408 U. S. 564, *Perry* v. *Sindermann*, 408 U. S. 593, and *California* v. *LaRue*, — U. S. —.

*See the Appendix to this opinion.

APPENDIX

The holding in *Monroe* v. *Pape* that municipalities are not subject to suits for damages under § 1983 was based largely on Congress's rejection of the Sherman Amendment, which would have provided compensation for individuals from the county, city or parish for any damage caused by riots, etc. Two theories were expressed in the debates for rejecting the amendment.

The first was the notion that civil liability for damages might destroy or paralyze local governments. Also, it was thought unjust that local governments (and indirectly the citizenry at large) should be subject to damages when they bore no responsibility. Although the Senate passed the amendment, Senator Stevenson stated in opposition:

> "This amendment wholly ignores the municipal liability created by the omission of direct, absolute corporate duty. We are now, for the first time, presented with an enactment which undertakes to create a corporate liability for personal injury which no prudence or foresight could have prevented. . . .
>
> "But, Mr. President, this amendment is clearly unconstitutional. If it is attempted to be carried out it will destroy the municipal government of every city and the local government of every county where this liability is created . . . . Let a judgment be recovered against any of our cities in the East or West and a lien is by this amendment created not only upon the municipal property of such city, but upon every dollar in the city treasury. The credit of the city, the means to discharge its con-

> tracts and its most solemn obligations are by the operation of this act to be applied to such judgment.
>
> "I have heard no reason for such a lien. If carried out to its full extent, it must prove utterly destructive of the State municipalities! And whence does the Federal Government derive its power in any manner or form to touch the revenues of the State governments or any of its agencies? . . ." Cong. Globe, 42d Cong., 1st Sess. 762.

Senators Casserly and Bayard expressed similar concerns. *Id.*, at 763–764, 776.

In the House, Congressman Kerr stated:

> "There is, therefore, a total and absolute absence of notice, constructive or implied, within any decent limits of law or reason. And the bill itself is significantly silent on the subject of notice to these counties and parishes or cities. Under this section it is not required, before liability shall attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality. . . . It takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge . . . ." *Id.*, at 788.

See also *id.*, at 791 (statement of Congressman Willard). And Congressman Farnsworth was concerned that the amendment would "put the hand of the national Government into [local government's] treasury." *Id.*, at 799.

There was another strain, however. Congressman Brooks the amendment as raising the old struggle between the Federalists and the Democrats. *Id.*, at 790. In the words of Congressman Poland, one of the House managers of the Conference Committee, "[w]ith these local subdivisions we have nothing to do. We can im-

pose no duty upon them; we can impose no liability upon them in any manner whatever." *Id.*, at 793. He stated further:

> "But the enforcing a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power or control over them whatever. . . .
>
> ". . . Counties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State, and are subject only to such duties and liabilities as State laws impose upon them." *Id.*, at 794.

After the House finally had defeated the Sherman Amendment and the Conference substitute for the amendment, Poland stated:

> "I did understand from the action and vote of the House that the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law." *Id.*, at 804.

See also *id.*, at 795 (statement of Congressman Burchard), 799 (satetment of Congressman Farnsworth).

To the extent that the Sherman Amendment was directed only at liability for damages and the devastating effect those damages might have on municipalities, it seems that the defeat of the amendment does not affect the existence *vel non* of an equitable action. One may, of course, argue that the sweeping statements of Poland and others that Congress had no constitutional power

(however defective that argument is in light of developed constitutional doctrine) to authorize any action against a subdivision of State government indicated a purpose to go the whole way and not allow even injunctive relief against a municipality. But this is a matter which the Court has never faced.